No. 12172

United States
Court of Appeals
For the Ninth Circuit.

ALLIED LUMBER COMPANY,

Appellant,

vs.

THE CLEVELAND LUMBER AND DOOR COMPANY,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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405 Montgomery Street, Room 1124,
San Francisco 4, Calif.

For Appellee The Cleveland Lumber and Door Company:

NEWLIN, HOLLEY, SANDMEYER & TACKABURY,

1020 Edison Bldg.,
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For Appellee Cecil L. Bandy etc.:

LLOYD J. SEAY,

311 S Vermont Ave.,
Los Angeles 5, Calif. [1*]

*** Page numbering appearing at bottom of page of original certified Transcript of Record.**

In the District Court of the United States for the Southern District of California, Central Division

Civil Action No. 8058-PH

THE CLEVELAND LUMBER AND DOOR COMPANY,

Plaintiff,

vs.

ALLIED LUMBER COMPANY; CECIL L. BANDY; and CECIL L. BANDY doing business under the fictitious firm name and style of PIONEER LUMBER COMPANY,

Defendants.

AMENDED COMPLAINT FOR RESCISSION AND FOR MONEY HAD AND RECEIVED

Plaintiff above named complains of the above-named defendants as follows:

I.

Plaintiff is a corporation incorporated under the laws of the State of Ohio; defendant Allied Lumber Company is a corporation incorporated under the laws of the State of California; defendant Cecil L. Bandy and Cecil L. Bandy, doing business under the fictitious firm name and style of Pioneer Lumber Company, is a citizen of the State of California and a resident of the County of Los Angeles, State of California. The matter in controversy [2] ex-

ceeds, exclusive of interest and costs of suit, the sum of $3,000.00

II.

That on or about the 14th day of October, 1947, plaintiff and defendants entered into a written agreement whereby in consideration of the payment to them of $16,808.05 defendants agreed to supply plaintiff with two carloads of certain lumber, to wit: 5/8 inch x 8 inch, A and better, thoroughly air dried redwood bevel siding; that by the terms of said agreement defendants warranted to plaintiff, among other things, that said lumber would be thoroughly air dried and would be in strict accordance with the rules of the California Redwood Association.

That the rules of the California Redwood Association provide that said lumber shall weigh not more than 800 pounds per thousand surface feet.

III.

That prior to inspection of said lumber plaintiff paid defendants said sum of $16,808.05; that said lumber was delivered to plaintiff on or about the 10th day of December, 1947, and that thereafter plaintiff examined and inspected said lumber; that said lumber was not in accordance with the terms and warranties set forth in the agreement hereinabove mentioned in Paragraph II hereof in that among other things said lumber was not thoroughly air dried and weighed more than 800 pounds per thousand surface feet, to wit, approximately 1400 pounds per thousand surface feet.

IV.

That on or about December 15, 1947, by reason of the facts hereinabove alleged plaintiff rescinded said agreement and made demand upon defendants for return of the sum of $16,808.05 to plaintiff and tendered to defendants said lumber.

V.

That defendants failed and refused and still fail and [3] refused to return to plaintiff said sum of $16,808.05.

VI.

That in addition to said sum of $16,808.05 paid defendants by plaintiff, plaintiff has been required to expend certain sums in connection with said lumber for unloading, piling, reloading, demurrage, and telephone and telegraph expenses in the sum of $480.00. That plaintiff has made demand upon dedefndants for all of said sums and that defendants have failed and refused and still fail and refuse to pay any of said sums to plaintiff.

VII.

That by reason of defendants' acts as hereinabove alleged plaintiff has been damaged in the total sum of $17,288.05, as follows:

Invoice for lumber paid	$16,808.05
Unloading and piling	200.00
Reloading	180.00
Demurrage	70.00
Telephone and telegrams from plaintiff to defendants	30.00

For a Second and Separate Claim Plaintiff Alleges:

I.

Plaintiff here incorporates and realleges the allegations contained in Paragraph I of plaintiff's first claim herein, with the same force and effect as though repeated at this point in full.

II.

Defendants owe plaintiff $17,288.05 for money had and received from plaintiff on or about the 1st day of December, 1947, to be paid by defendants to plaintiff. [4]

Wherefore, plaintiff prays judgment against defendants in the sum of $17,288.05; for its costs of suit herein incurred and for such other relief as may be proper in the premises.

NEWLIN, HOLLEY, SANDMEYER & TACKABURY,

By /s/ FRANK R. JOHNSTON,

Attorneys for Plaintiff.

[Endorsed]: Filed April 13, 1948. [5]

[Title of District Court and Cause.]

Civil Action No. 8058-PH

ANSWER OF CECIL L. BANDY, AND CECIL L. BANDY, DOING BUSINESS UNDER THE FICTITIOUS FIRM NAME AND STYLE OF PIONEER LUMBER COMPANY

Comes Now the defendant, Cecil L. Bandy, and Cecil L. Bandy, doing business under the fictitious firm name and style of Pioneer Lumber Company, and for his separate answer to the amended complaint filed herein, admits, denies, and alleges as follows:

I.

Answering paragraph II of said amended complain, this answering defendant denies that it entered into a written agreement with plaintiff to supply plaintiff with two carloads of lumber, to wit: 5/8" x 8", A and better, thoroughly air dried redwood bevel siding, and denies further that said defendant warranted to plaintiff that said lumber would be thoroughly air dried and would be in strict accordance with the rules of the California Redwood Association, as therein alleged. [6]

II.

Answering paragraph III of said amended complaint, the defendant admits that plaintiff paid to defendant said sum of Sixteen Thousand Eight Hundred and Eight and 05/100 ($16,808.05) Dollars as agent for co-defendant, Allied Lumber Company.

Except as hereinabove admitted, defendant denies each and every material allegation contained in said paragraph III, both specifically and generally.

III.

Answering paragraph IV of said amended complaint, the defendant denies that plaintiff rescinded said agreement and made demand upon this answering defendant for the return of the sum of Sixteen Thousand Eight Hundred and Eight and 05/100 ($16,808.05) Dollars and tendered to said answering defendant said lumber, as therein alleged.

IV.

Answering paragraph VI of said amended complaint, this answering defendant denies each and every allegation contained therein, both specifically and generally, except that said defendant admits that it has refused and still refuses to pay any of said sum to plaintiff, as therein alleged.

V.

Answering paragraph VII of said amended complaint, defendant denies each and every allegation contained therein, both specifically and generally, except that defendant admits that it received the sum of Sixteen Thousand Eight Hundred and Eight and 05/100 ($16,808.05) Dollars for said lumber as agent for the co-defendant, Allied Lumber Company.

VI.

Answering paragraphs I and II of plaintiff's Second and Separate Claim, this answering defend-

ant denies each and every material allegation contained therein, by reference or otherwise, [7] except as is hereinabove admitted, in answer to plaintiff's First Cause of Action.

As a Further Separate and Distinct Defense to Plaintiff's Causes of Action Set Forth in Said Amended Complaint, this answering defendant alleges:

I.

That on or about the 2nd day of October, 1947, this defendant was instructed to ship to plaintiff two carloads of 5/8" x 8" "A" and better grade, air dried bevel siding, plain edge pattern 326, California Redwood Association standard specifications to apply. That this defendant shipped two carloads of lumber to plaintiff, but that this answering defendant never, at any time, warranted the moisture content of said lumber, and never, at any time, warranted that said lumber would be thoroughly air dried and would be in strict accordance with the rules of the California Redwood Association. That at the time of filling said order for the Allied Lumber Company, the said Allied Lumber Company was thoroughly advised of the condition of said lumber, and said shipment of the lumber in its condition was made at the request and under conditions known to Allied Lumber Company. That during all times mentioned in said amended complaint, this answering defendant was acting as agent for the Allied Lumber Company.

This answering defendant further alleges that at

all times mentioned in said amended complaint, and up to February 19, 1948, plaintiff has retained said lumber, and still retains said lumber, and said lumber has been under the custody, control, and disposition of the plaintiff.

II.

This defendant further alleges that the subject matter and alleged causes of action sued upon herein are the same as that set up in a cause of action filed in the District Court of the United States for the Northern District of California, [8] Southern Division, being action # 278672, wherein the Allied Lumber Company is plaintiff, and Pioneer Lumber Company, Cleveland Lumber and Door Company, et al., are defendants. That said action is now pending in said court.

Wherefore, this defendant prays that plaintiff take nothing upon the amended complaint filed herein, and that he have and recover his costs herein expanded.

/s/ LLOYD J. SEAY,

Attorney for Cecil L. Bandy, and Cecil L. Bandy, doing business under the fictitious firm name and style of Pioneer Lumber Company.

Admitted as Defendant's (Allied) Exhibit H, Oct. 20, 1948.

Affidavit of Service by mail attached.

[Endorsed]: Filed May 4, 1948. [9]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now Allied Lumber Company, one of the defendants above named, and answering complaint on file herein, admits, denies and alleges as follows:

Answering the first count or cause of action set forth in the said amended complaint, this defendant admits, denies and alleges as follows:

I.

Alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph I of the said first count or cause of action commencing with the word "defendant" on line 29, page 1 of the said complaint, and ending with the word "California" [11] on line 32, page 1, of the said complaint; admits the remaining allegations contained in the said paragraph.

II.

Denies generally and specifically the allegations contained in Paragraph II of the said complaint and in this connection alleges that within two years next last past, Cleveland Lumber and Door Co. ordered from this defendant lumber according to certain specifications; that this defendant, as broker, transmitted said order to the Pioneer Lumber Company; that the Pioneer Lumber Company agreed to complete said order and ship direct to defendant provided that defendant paid Pioneer Lumber Company the sum of $16,808.05 on its sight draft, all

of which plaintiff consented to do. That thereupon Pioneer Lumber Company forwarded said lumber to plaintiff at Cleveland, Ohio, for which they received from plaintiff said sum of $16,808.05 on said sight draft. That shortly after the arrival of said lumber at Cleveland, Ohio, plaintiff stated to Pioneer Lumber Company and this defendant that the same was not according to said specifications and that the plaintiff was drawing a sight draft on the Pioneer Lumber Company for the amount it paid Pioneer Lumber Company. That this defendant was informed and believes and therefore alleges that said sight draft was not paid nor was any sum paid plaintiff. Defendant was informed and believes and therefore alleges that the plaintiff has returned the said lumber to the Pioneer Lumber Company that said lumber is now under its control and custody.

III.

Denies that the plaintiff paid to this defendant any sum whatever at any time; alleges that with the exception of the said denial this defendant has no information or belief upon the subject sufficient to enable it to answer the [12] allegations contained in Paragraph III of the said first count or cause of action, and basing its denial on that ground, denies generally and specifically the said allegations.

IV. and V.

Admits that the plaintiff has demanded of this defendant the sum of $16,808.05 and that this defendant has failed and refused to pay the same, or

any part thereof, and alleges that no sum whatever is due or owing from this defendant to the plaintiff; alleges that with the exception of the foregoing denial this defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph IV of the said first count or cause of action and basing its denial on that ground denies generally and specifically the said allegations.

VI.

Admits that the plaintiff has demanded from this defendant payment of the sums specified in Paragraph VI of the said first count or cause of action, and that this defendant has failed and refused to pay the same, or any part thereof, and alleges that no sum whatever is due or owing from this defendant to the plaintiff, and further alleges that with the exception of the foregoing denial this defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in the said paragraph, and basing its denial on that ground, denies generally and specifically the said allegations.

VII.

Denies that the plaintiff has been damaged in any sum whatever by any act or acts of this defendant and alleges that with the exception of the foregoing denial this defendant has no information or belief upon the subject sufficient to [13] enable it to answer the allegations contained in Paragraph VII of the said cause of action, and basing its denial on

that ground, denies generally and specifically the said allegations.

As and for a separate second and independent defense to the said alleged first count or cause of action, this defendant alleges that there was at the commencement of this action and still is another action pending in the District Court of the United States for the Northern District of California, Southern Division, between the parties to the above-entitled action and for the same cause of action as that set forth in the first alleged count or cause of action contained in the said complaint on file in the above-entitled action, and which prior action between the same parties and for the same subject matter and the same cause of action is titled "Allied Lumber Company vs. Pioneer Lumber Company, Ross Matjasic, Cleveland Lumber and Door Co., a foreign corporation, Reserve Lumber Company, First Doe, Second Doe and Third Doe, Cecil Bandy" and numbered 27867R in the records of the said District Court of the United States for the Northern District of California, Southern Division, and that attached hereto, marked "Exhibit A" and by this reference made a part hereof, and incorporated herein with the same force and effect as if it were specifically set forth is a copy of the complaint on file in the said prior action.

Answering the second count or cause of action set forth in the said complaint this defendant admits, denies and alleges as follows:

I.

Incorporates herein the answering allegations to Paragraph I of the said first count or cause of action set forth in the said complaint, and incorporated by reference in [14] Paragraph I of the said second count or cause of action with the same force and effect as if here specifically set forth.

II.

Denies that this defendant owes the plaintiff any sum whatever; denies that this defendant received from plaintiff on or about the 1st day of December, 1947, or at any time whatever any sum whatever; alleges that with the exception of the foregoing denial this defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph II of the said second count or cause of action, and basing its denial on that ground, denies generally and specifically the said allegations.

As and for a separate second and independent defense to the said second count or cause of action, this defendant alleges that there was at the commencement of this action and still is another action pending in the District Court of the United States for the Northern District of California, Southern Division, between the parties to the above entitled action and for the same cause of action as that set forth in the second alleged count or cause of action contained in the said complaint on file in the above entitled action, and which prior action between the same parties and for the same subject matter and

the same cause of action is titled "Allied Lumber Company vs. Pioneer Lumber Company, Ross Matjasic, Cleveland Lumber and Door Co., a foreign corporation, Reserve Lumber Company, First Doe, Second Doe and Third Doe, Cecil Bandy" and numbered 27867R in the records of the said District Court of the United States for the Northern District of California, Southern Division, and that attached hereto, marked "Exhibit A" and by this reference made a part hereof, and incorporated herein with the same force and effect as if it were specifically set [15] forth is a copy of the complaint on file in the said prior action.

As and for a third separate and independent defense to each of the said alleged causes of action set forth in the complaint, this defendant alleges that the plaintiff has heretofore waived all causes of action against this defendant.

As and for a fourth separate and independent defense to each of the said alleged causes of action set forth in the complaint, this defendant alleges that the plaintiff is estopped by reason of its conduct from asserting against this defendant the said alleged causes of action, or either of them.

Wherefore defendant prays that further proceedings in the above entitled action be stayed pending the entry of a final judgment in the said prior action hereinabove referred to, and that this defendant be thence dismissed with its costs of suit incurred and to be incurred herein, and for such

other and further relief as to this court may seem proper in the premises.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Allied Lumber Company. [16]

EXHIBIT "A"

In the District Court of the United States for the Northern District of California, Southern Division

No. 27867R Dept. .....

ALLIED LUMBER COMPANY,
Plaintiff,

vs.

PIONEER LUMBER COMPANY, ROSS MATJASIC, CLEVELAND LUMBER & DOOR CO., a foreign corporation, RESERVE LUMBER COMPANY, FIRST DOE, SECOND DOE and THIRD DOE, CECIL BANDY,
Defendants.

CIVIL COMPLAINT

I.

Allied Lumber Company is a California corporation with its principal place of business in the county of Santa Clara, state of California. Plaintiff was informed and believes and upon such information and belief alleges that Cleveland Lumber and Door Co. and Reserve Lumber Company were and at all times herein mentioned are foreign corpora-

tions with its principal place of business in Cleveland, Ohio. That the Pioneer Lumber Company was and is a partnership composed of Ross Matjasic and Cecil Bandy.

II.

That the true names of the defendants First Doe, Second Doe and Third Doe are unknown to plaintiff, and plaintiff prays that when they are ascertained that they may be inserted in this [17] Complaint and all subsequent proceedings. That the Reserve Lumber Company claims some interest in and to the matters involved in this Complaint, but the nature or extent of their interest is unknown to plaintiff.

III.

That within two years next last past, Cleveland Lumber and Door Co. ordered from plaintiff lumber according to certain specifications; that plaintiff, as broker, transmitted said order to the Pioneer Lumber Company; that the Pioneer Lumber Company agreed to complete said order and ship direct to Cleveland Lumber and Door Co. provided that Cleveland Lumber and Door Co. paid Pioneer Lumber Company the sum of $16,808.05 on its sight draft, all of which Cleveland Lumber and Door Co. consented to do. That thereupon Pioneer Lumber Company forwarded said lumber to Cleveland Lumber and Door Co. at Cleveland, Ohio, for which they received from Cleveland Lumber and Door Co. said sum of $16,808.05 on said sight draft. That shortly after the arrival of said lumber at Cleveland, Ohio,

Cleveland Lumber and Door Co. stated to Pioneer Lumber Company and plaintiff that the same was not according to said specifications and that the Cleveland Lumber and Door Co. was drawing a sight draft on the Pioneer Lumber Company for the amount it paid Pioneer Lumber Company. That plaintiff was informed and believes and therefore alleges that said sight draft was not paid nor was any sum paid Cleveland Lumber and Door Co. Plaintiff was informed and believes and therefore alleges that the Cleveland Lumber and Door Co. has returned the said lumber to the Pioneer Lumber Company and that said lumber is now under its control and custody.

Wherefore, plaintiff prays that the court determine the respective rights of the parties hereto.

RUDOLPH J. SCHOLZ,
Attorney for plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed June 1, 1948. [18]

In the District Court of the United States for the Southern District of California, Central Division

Civil Action No. 8058—PH

THE CLEVELAND LUMBER AND DOOR COMPANY,

Plaintiff,

vs.

ALLIED LUMBER COMPANY: CECIL L. BANDY; and CECIL L. BANDY doing business under the fictitious firm name and style of PIONEER LUMBER COMPANY,

Defendants.

MOTION TO CONSOLIDATE

To: The Cleveland Lumber and Door Company, the plaintiff above named; Newlin, Holley, Sandmeyer and Tackabury, its attorneys; Cecil L. Bandy; and Cecil L. Bandy, doing business under the fictitious firm name and style of Pioneer Lumber Company; and to Avery Seay and Lloyd J. Seay, his attorneys:

You and each of you will please take notice that on the 14th day of June, 1948, in the courtroom of the above entitled court at the hour of ten o'clock a.m., or as soon thereafter as counsel may be heard, Allied Lumber Company, one of the defendants above named, by and through its undersigned attorney, will move the above entitled court for an order consolidating the above entitled action with

that certain court action between the parties above named and for the same cause of action set forth in the complaint on file herein which was commenced prior to the commencement of the above entitled action and is still pending in the District Court of [20] the United States for the Northern District of California, Southern Division, titled "Allied Lumber Company vs. Pioneer Lumber Company, Ross Matjasic, Cleveland Lumber and Door Co., a foreign corporation, Reserve Lumber Company, First Doe, Second Doe and Third Doe, Cecil Bandy" and numbered 27867R in the records of the said court.

The said motion will be based on the ground that the ends of justice and the interests of the parties will best be served by consolidating the said actions for trial in the District Court of the United States for the Northern District of California, Southern Division, and that a multiplicity of actions which would otherwise result shall thus be avoided.

The said motion will be made and based upon this notice and upon all the records and papers on file in the above entitled action and in the said prior action hereinabove referred to.

Dated May 29, 1948.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Allied Lumber Company.

Memorandum of authorities in support of foregoing motion:

Fed. Rules of Civil Procedure, Rule 42 (a); California Code of Civil Procedure, Sec. 1048.

Affidavit of service by mail attached.

[Endorsed]: Filed June 1, 1948. [21]

[Title of District Court and Cause.]

ORDER DENYING MOTION TO CONSOLIDATE

Defendant Allied Lumber Company's motion to consolidate the above entitled action with an action entitled "Allied Lumber Company vs. Pioneer Lumber Company, et al," numbered 27867-R pending in the District Court of the United States for the Northern District of California, Southern Division, having been duly heard on the 12th day of July, 1948, all parties being represented by counsel,

It Is Hereby Ordered that said motion be and it is hereby denied.

Dated July 14th, 1948.

/s/ PAUL J. McCORMICK,
Judge of the U. S. District Court.

Approved as to form pursuant to local Rule No. 7.

RUDOLPH J. SCHOLZ,
HAROLD J. CASHIN,
Attorneys for Allied Lumber Company.

LLOYD J. SEAY,
Attorney for Cecil L. Bandy and Cecil L. Bandy, doing business under the fictitious name and style of Pioneer Lumber Company. [24]

Affidavit of service by mail attached.

[Endorsed]: Filed July 14, 1949. [23]

United States District Court, Southern District of California, Central Division

No. 8058-PH. Civil

THE CLEVELAND LUMBER AND DOOR COMPANY,

Plaintiff,

vs.

ALLIED LUMBER COMPANY; CECIL L. BANDY; and CECIL L. BANDY Doing Business Under the Fictitious Firm Name and Style of PIONEER LUMBER COMPANY,

Defendants.

OPINION

Cavanah, District Judge.

The present action is brought by The Cleveland Lumber and Door Company against the Allied

Lumber Company and the Pioneer Lumber Company for a rescission of a written contract for the purchase of two carloads of dried lumber thoroughly air-dried redwood siding to be shipped to the plaintiff at Cleveland, Ohio, upon two orders of plaintiff accepted by the defendant Allied Lumber Company which appeared when arriving at Cleveland to be green. The purchase price was by the plaintiff to the defendant Allied Lumber Company. The defendant Allied Lumber Company not having the lumber in stock, without the knowledge of the [27] plaintiff, requested the defendant Pioneer Lumber Company to ship the lumber to the plaintiff. On receipt of the defendant Allied Lumber Company's order the defendant Pioneer Lumber Company diverted the two cars to the plaintiff which it had consigned to the Elliott Lumber Company at Danville, Illinois. The defendant Pioneer Lumber Company at that time had purchased two carloads of redwood beveled siding from Hammond Lumber Company of Los Angeles for consignment to the Elliott Lumber Company of Danville, Illinois, who was not connected with the present litigation, and on receipt of the defendant Pioneer Lumber Company's order it diverted the cars to the plaintiff. The purchase by the defendant Pioneer Lumber Company from the Hammond Lumber Company was as green lumber, but the Pioneer Lumber Company with the shipment to the plaintiff sent an invoice to the plaintiff describing the lumber as "air-dry." The defendant Allied Lumber Company requested

the plaintiff to pay the purchase price for the lumber directly to the defendant Pioneer Lumber Company by the telegraphing of funds to cover the purchase price, which was done and the lumber was paid for before it arrived at the yards of the plaintiff in Cleveland. On its inspection by the plaintiff it was found to be not air-dried but green. The plaintiff then promptly demanded of the defendants the return of the $15,087.60, which it had paid for the lumber, and requested advice from the defendants as to what disposition the defendants desired to make of the lumber. The notice was sufficient notice of rescission under the evidence. The defendants have not returned to the plaintiff the purchase price of the lumber nor given any order to plaintiff as to what they wish done with the lumber.

There seems to be no question that the lumber shipped to the plaintiff was not in accordance with specifications as it was green instead of air-dried, and the plaintiff after paying the purchase is entitled to a rescission of the contract for the purchase of it and a recovery of the purchase price which it paid and legal interest from date of rescission, together with such expenses as handling, freight and storage charges.

The primary questions involved are whether the plaintiff may secure judgment against both of the defendants as contended for by it to the extent of the amount of its loss, or whether such recovery should be confined against the defendants separately.

The contention of the defendant Allied Lumber Company is that it was the agent of the defendant Pioneer Lumber Company, and also that there was a novation resulting in a substitution of the defendant Pioneer Lumber Company for the defendant Allied Lumber Company as the obligor under the contract, while the defendant Pioneer Lumber Company asserts that it was the agent of the defendant Allied Lumber Company, and both assert that the plaintiff should be required to make an election. In response to these contentions the plaintiff contends that it has the right to recover against both of the defendants for the full amount of the purchase price of the lumber and expenses.

An analysis of the evidence discloses that none of the relationships contended for by the defendants existed as the two orders for the purchase of the lumber were by the plaintiff transmitted to the defendant Allied Lumber Company and accepted by it which constituted the contract between the plaintiff and the defendant Allied Lumber Company and revealed that the Allied Lumber Company was acting for itself and was the shipper. The fact that after the [29] contract had been executed the plaintiff received information that the defendant Pioneer Lumber Company was the defendant Allied Lumber Company's supplier did not alter the legal relationship created by the contract between the plaintiff and the defendant Allied Lumber Company, Pickands, Mather & Co. v. H. A. & D. W. Kuhn & Co., 8 F. (2d) 704. The evidence does not disclose

that the defendant Pioneer Lumber Company was substituted in place of the defendant Allied Lumber Company in the original contract, or that the plaintiff consented and intended to release the defendant Allied Lumber Company the original obligor and accepted the defendant Pioneer Lumber Company in its place. Illinois Car & Equipment Co. v. Linstroth Wagon Co., 112 F. 737; United States, for Use and Benefit of Worthington Pump & Machinery Corporation, v. John A. Johnson Contracting Corporation et al., 139 F. 2d 274, certiorari denied.

To create a novation there must be consent by all of the parties to the substitution of a new party in place of the original obligor. No such consent appears in the evidence. The plaintiff insisted at all times on dealing with the defendant Allied Lumber Company, and made the payment of the purchase price to it. The contract was not canceled, and the defendant Allied Lumber Company merely advised the plaintiff that its supplier was the defendant Pioneer Lumber Company.

The mere fact that the defendant Pioneer Lumber Company was acting with the defendant Allied Lumber Company does not excuse it from the necessity of making complete restitution of the purchase price and expenses as it was guilty of wrongdoing which amounted to fraud. It invoiced and labeled the two cars shipped to the plaintiff as "air-dry" lumber knowing that the lumber shipped was green. Under such circumstances it cannot escape liability.

Stirnus v. Adams, 50 Cal. App. 730; Hohn et al. v. Peters, 216 Cal. 406. The fact that the defendant Pioneer Lumber Company is also compelled to make restitution as a misrepresenting wrongdoer does not relieve the defendant Allied Lumber Company also making restitution. If the defendant Allied Lumber Company feels that it has a grievance against the defendant Pioneer Lumber Company, it is privileged to institute an action against it.

As to the contention that the plaintiff should be required to make an election as against the defendant Allied Lumber Company or the defendant Pioneer Lumber Company is not tenable under the evidence and the principle of law applicable. Heintzsch et al. v. LaFrance et al., 3 Cal. (2d) 180; Joseph Denunzio Fruit Co. v. Crane, 79 F. Supp. 117. Thus, the motion that the plaintiff elect whether it will take judgment against one of the defendants is denied, as the conclusion is reached that both of the defendants are liable to the plaintiff. Therefore, the plaintiff is entitled to recover the amount of the purchase price paid by it, together with legal interest thereon, storage handling charges, and freight and demurrage charges against both of the defendants, and the defendants are directed to remove the lumber from the premises of the plaintiff, and costs of suit.

Counsel for the plaintiff will prepare Findings and Decree. [31]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action regularly came on for trial on October 19, 1948, and was tried on October 19, 20, 21 and 22, 1948, before the Honorable Charles C. Cavanah, District Judge, without a jury. Plaintiff appeared by Newlin, Holley, Sandmeyer & Tackabury, by Frank R. Johnston, its attorneys; defendant Allied Lumber Company appeared by Rudolph J. Scholz and Wallace, Cashin & Arrington, by Rudolph J. Scholz and Harold J. Cashin, its attorneys; defendant Cecil L. Bandy and Cecil L. Bandy, doing business under the fictitious firm name and style of Pioneer Lumber Company, appeared by Lloyd J. Seay, his attorney. Evidence, oral and documentary, was received and the evidence having been closed and the matter fully argued by counsel for the respective parties, the matter was taken under submission by the Court. The Court thereafter announced its [32] decision in favor of the plaintiff and now makes and files its written Findings of Fact and Conclusions of Law as follows:

The Court Finds:

I.

On January 26, 1948, and at all times continuously since said date:

(a) Plaintiff has been and now is a corporation organized under and existing by virtue of the laws of the State of Ohio;

(b) Defendant Allied Lumber Company has been and now is a corporation organized under and existing by virtue of the laws of the State of California;

(c) Defendant Cecil L. Bandy and Cecil L. Bandy, doing business under the fictitious firm name and style of Pioneer Lumber Company, has been and now is a resident and citizen of the State of California and has been and now is the sole owner of Pioneer Lumber Company.

II.

On October 14, 1947, plaintiff and defendant Allied Lumber Company entered into a written agreement whereby in consideration of the payment of $15,087.60 by plaintiff to defendant Allied Lumber Company, defendant Allied Lumber Company agreed to furnish and deliver to plaintiff at Cleveland, Ohio, two carloads of certain lumber, to wit, 5/8 x 8, A and better, thoroughly air dried redwood bevel siding.

III.

On October 14, 1947, defendant Allied Lumber Company, without the knowledge of plaintiff, entered into an agreement with Pioneer Lumber Company whereby Pioneer Lumber Company agreed to deliver to plaintiff at Cleveland, Ohio, two cars of 5/8 x 8, A and better, air dried redwood bevel siding in consideration of the payment by Allied Lumber Company to Pioneer Lumber Company of $13,440.00.

Pioneer Lumber Company, on November 19, 1947, purchased two [33] cars of redwood bevel siding from the Hammond Lumber Company at Los Angeles, California. Said cars of lumber were sold to and purchased by Pioneer Lumber Company, as green lumber and were so invoiced by Hammond Lumber Company to Pioneer Lumber Company. At no time did defendants or anyone acting under their direction subject said lumber to any drying process whatsoever. Defendant Cecil L. Bandy and Cecil L. Bandy, doing business under the fictitious firm name and style of Pioneer Lumber Company invoiced said lumber to plaintiff by invoices dated November 29, 1947, and December 3, 1947, as air dry lumber and said defendant at all times knew that said lumber was green and not air dry. Pioneer Lumber Company consigned and shipped said two cars of redwood bevel siding purchased by said defendant from Hammond Lumber Company to plaintiff and said two cars arrived at plaintiff's yard in Cleveland, Ohio, on December 11, 1947, together with said invoices of Pioneer Lumber Company dated November 29, 1947, and December 3, 1947.

IV.

Pursuant to demand of defendant Allied Lumber Company, plaintiff telegraphed the sum of $15,-087.60 to the order of defendant Allied Lumber Company on December 5, 1947, in payment of the purchase price of said lumber and on December 5, 1947, defendant Allied Lumber Company paid Pioneer Lumber Company, from said sum of $15,-

087.60 the amount of $13,440.00 and retained the amount of $1,647.60.

V.

On arrival of said two cars of redwood bevel siding at the yard of plaintiff in Cleveland, Ohio, on December 11, 1947, plaintiff inspected said cars and found the lumber therein to be green and not air dry. On or before December 20, 1947, plaintiff gave notice of rescission to defendants by demanding back the purchase price plaintiff had paid for said lumber and by requesting advice of defendants as to what disposition defendants desired to make of the lumber. [34]

Defendants have not returned to plaintiff the purchase price of the lumber and have not given any order to plaintiff as to disposition of the lumber, and said lumber has remained stored since December 11, 1947, in the yard of plaintiff.

VI.

The agreement, hereinabove referred to in paragraph II hereof by the terms of which defendant Allied Lumber Company agreed to deliver to plaintiff at Cleveland, Ohio, thoroughly air dried redwood bevel siding, remained in full force and effect until rescinded by plaintiff as found in paragraph V hereof and the lumber delivered to plaintiff at Cleveland, Ohio, was not in conformity with that agreed to be delivered by the terms of said agreement, in that said lumber was green and not air dried, or air dry.

Defendant Allied Lumber Company did not at any time in connection with the purchase and sale of said lumber to plaintiff act as an agent or broker.

No act, acts or conduct by plaintiff have created an estoppel, waiver, or other relinquishment of plaintiff's right of restitution against all defendants.

Defendant Cecil L. Bandy and Cecil L. Bandy, doing business under the fictitious firm name and style of Pioneer Lumber Company, wilfully, knowingly and fraudulently delivered green lumber to plaintiff at Cleveland, Ohio, and wilfully, knowingly and fraudulently invoiced said lumber as air dry.

VII.

Plaintiff has expended in connection with the purchase of said lumber the following sums for the items hereinafter set forth:

Purchase price of lumber	$15,087.60
Freight	1,713.43
Reconsignment charges	7.02
Demurrage	84.98
Unloading, tallying and piling charges	199.68
Storage charges	690.00
Total	$17,782.71

CONCLUSIONS OF LAW

As Conclusions of Law, the Court finds and concludes:

I.

That plaintiff is entitled to judgment in the sum of $17,782.71 together with interest on the purchase price from and after December 20, 1947, at the rate of 7% per annum, to wit, $997.11 being a total of $18,779.82, together with plaintiff's costs of suit, against the defendants, and each of them.

Defendants are directed to remove at their expense the lumber from plaintiff's premises upon full satisfaction of the judgment herein, provided said lumber has not theretofore been sold on foreclosure of plaintiff's statutory lien thereon.

Dated: December 13th, 1948.

/s/ CHARLES C. CAVANAH,
District Judge.

Approved as to form:

RUDOLPH J. SCHOLZ and
WALLACE, CASHIN AND
ARRINGTON,
Attorneys for Defendant
Allied Lumber Company.

/s/ LLOYD J. SEAY,
Attorney for Defendant Cecil L. Bandy and Cecil L. Bandy, doing business under the fictitious name and style of Pioneer Lumber Company.

Lodged Dec. 1, 1948.

Received copy of the within Proposed Findings this 1st day of December, 1948.

WALLACE, CASHIN &
ARRINGTON.
By /s/ HAROLD J. CASHIN,
One of Attorneys for Defendant Allied Lumber Co.

(Suggesting that copy should be served on Rudolph J. Scholz in San Francisco, who is principal Attorney of record for Allied Lumber Co.

[Endorsed]: Filed Dec. 15, 1948. [36]

In the District Court of the United State for the Southern District of California, Central Division

Civil Action No. 8058-PH

THE CLEVELAND LUMBER AND DOOR COMPANY,

Plaintiff,

vs.

ALLIED LUMBER COMPANY, et al.,

Defendants.

JUDGMENT

This action regularly came on for trial on October 19, 1948, and was tried on October 19, 20, 21 and 22, 1948, before the Honorable Charles C. Cavanah, District Judge, without a jury. Plaintiff

appeared by Newlin, Holley, Sandmeyer & Tackabury, by Frank R. Johnston, its attorneys; defendant Allied Lumber Company appeared by Rudolph J. Scholz and Wallace, Cashin & Arrington, by Rudolph J. Scholz and Harold J. Cashin, its attorneys; defendant Cecil L. Bandy and Cecil L. Bandy, doing business under the fictitious firm name and style of Pioneer Lumber Company, appeared by Lloyd J. Seay, his attorney. Evidence, oral and documentary, was received and the evidence having been closed and the matter fully argued by counsel for the respective parties, the matter was taken under submission by the Court. The Court thereafter announced its [38] decision in favor of the plaintiff and has made and filed herein its written Findings of Fact and Conclusions of Law; Now, Therefore,

It Is Ordered, Adjudged and Decreed that plaintiff have judgment in the sum of $18,779.82, together with plaintiff's costs of suit in the amount of $185.76, against defendants, and each of them.

It Is Further Ordered, Adjudged and Decreed that defendants be and they are hereby directed to remove at their expense the lumber delivered to plaintiff by defendants from plaintiff's premises upon full satisfaction of the judgment herein, provided that said lumber has not theretofore been sold on foreclosure of plaintiff's statutory lien thereon.

Dated: December 13th, 1948.

/s/ CHARLES C. CAVANAH,
District Judge.

Approved as to form:

RUDOLPH J. SCHOLZ and
WALLACE, CASHIN AND
ARRINGTON,
Attorneys for Defendant
Allied Lumber Company.

/s/ LLOYD J. SEAY,
Attorney for Defendant Cecil L. Bandy and Cecil L. Bandy, doing business under the fictitious name and style of Pioneer Lumber Company.

Received copy of the within Proposed Judgment this 1st day of December, 1948.

WALLACE, CASHIN &
ARRINGTON,
By /s/ HAROLD J. CASHIN,
One of Attorneys for Allied
Lumber Co.

(Suggested that copy should be sent to Rudolph J. Scholz in San Francisco, who is principal attorney of record for Allied Lumber Co.)

Judgment entered Dec. 16, 1948.

Docketed Dec. 16, 1948. [39]

[Endorsed]: Filed Dec. 15, 1948.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Plaintiff in the above-entitled action and to Newlin, Holley, Sandmeyer & Tackabury, attorneys for plaintiff:

You and each of you will please take notice that the defendant in the above-entitled action, Allied Lumber Company, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment given, made and entered in the above-entitled action and from the whole thereof, which judgment was entered on the 16th day of December, 1948, in Judgment Book 54, Page 533.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Said Defendant.

Received copy of the within Notice of Appeal this 29th day of December, 1948, 3:07 p.m.
NEWLIN, HOLLEY, SANDMEYER & TACKABURY.
By /s/ DOROTHY S. UPDEGRAFF,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 29, 1948. [42]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

I.

That sale was made by Pioneer Lumber Company to Cleveland Lumber and Door Company.

II.

Allied Lumber Company was merely a merchandise broker.

III.

That the Court should have required Cleveland Lumber and Door Company to make an election against which defendant it desired judgment.

IV.

That judgment cannot be against both principal and agent in this case.

V.

That Cleveland is estopped from asserting this cause of action against Allied. That it ratified the sale by Pioneer Lumber [43] Company and/or waived any of its rights against Allied Lumber Company.

VI.

The pleadings do not permit a judgment against Allied Lumber Company.

VII.

No rescission was made as to Allied Lumber Company.

VIII.

Novation.

IX.

That the findings of fact do permit a fair understanding under Rule 52(a) of Federal Rules of Civil Procedure.

X.

That the Court errored in the following findings: I (c), IV, V, VI.

XI.

That the court errored in the following conclusions of law: (a) plaintiff is entitled to judgment against this defendant; (b) That plaintiff is entitled to interest; (c) That plaintiff was entitled to sell said lumber by foreclosure of plaintiff's statutory lien.

XII.

That the Court errored in denying motion to consolidate.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Defendant
Allied Lumber Company.

Received copy of the within Statement of Points this 29th day of December, 1948, 3:07 p.m.
NEWLIN, HOLLEY, SANDMEYER & TACKABURY.
By /s/ DOROTHY S. UPDEGRAFF,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 29, 1948. [45]

[Title of District Court and Cause.]

PRAECIPE FOR PREPARATION OF RECORD ON APPEAL

To the Clerk of the above-entitled Court:

Defendant Allied Lumber Company having filed herein its Notice of Appeal in the above-entitled action, you are hereby requested to prepare record on appeal consisting of the following:

1. Pleadings except complaint.
2. Decision of the Court.
3. Findings and judgment.
4. Notice of Appeal.
5. Order denying motion to consolidate.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Defendant. [46]

Received copy of the within Praecipe for Preparation of Record on Appeal this 29th day of December, 1948, 3:07 p.m.

NEWLIN, HOLLEY, SANDMEYER & TACKABURY.

By /s/ DOROTHY S. UPDEGRAFF,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 29, 1948. [47]

United States District Court in and for the Southern District of California, Central Division

No. 8058-PH Civil

THE CLEVELAND LUMBER AND DOOR COMPANY,

Plaintiff,

vs.

ALLIED LUMBER COMPANY; CECIL L. BANDY; and CECIL L. BANDY, doing business under the fictitious firm name and style of PIONEER LUMBER COMPANY,

Defendants.

Honorable Charles C. Cavanah, Judge, Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Tuesday, October 19, 1948

Appearances:

For the Plaintiff: Messrs. Newlin, Holley, Sandmeyer & Tackabury, by Frank R. Johnston, Esq.

For the Defendant Allied Lumber Co.: Rudolph J. Scholz, Esq., and [1*] Messrs. Wallace, Cashin and Arrington, by H. J. Cashin, Esq.

For the Defendant C. L. Bandy, Pioneer Lumber Co.: Lloyd J. Seay, Esq. [2]

* Page numbering appearing at top of page of original Reporter's Transcript.

Q. Mr. Coombs, you testified that this lumber was sold to the Pioneer Lumber Company here in Los Angeles, is that correct? A. Yes, sir.

Q. So far as you know, so far as Hammond Lumber Company knew, Allied Lumber Company had nothing to do with it?

A. No, sir. Our dealings were with Pioneer Lumber Company. We never knew anybody else at all.

They didn't enter into the transaction.

Q. And you have on this exhibit 16 "Will Call Nov. 28" and on the other one "Will Call Dec. 2." Does that mean that the Pioneer Lumber Company would call for the lumber on those dates?

A. Those are the dates on which they were shipped. These are shipping dates. The bill of lading will confirm the actual shipping date.

Q. Then, on Exhibit 17, "Will Call Dec. 2," you have on this copy stamped "Paid by Check Dec. 3, 1947." A. That is right.

Q. That was paid by the Pioneer Lumber Company?

A. That was paid by the Pioneer Lumber Company, yes, sir.

Q. In other words, this was a c.o.d., is that correct? A. That is right. [35]

* * *

Q. Mr. Beaumont, I show you invoice of the Cleveland Lumber and Door Company, dated December 15, 1948, to Pioneer Lumber Company and/or Allied Lumber Company, reading as follows:

To unloading, tallying and piling approximately 60,000 ½ by 8 redwood siding contained in car IC 37703, [48] three men, total 29½ hours each, at $1.06½ per hour, $94.25.

I will ask you if that represents the cost incurred by you in unloading the IC car.

A. That was our actual cost.

Mr. Johnston: I would like to offer this document in evidence.

Mr. Scholz: May I see it just a minute, before you offer it in evidence.

Mr. Johnston: Certainly. I will question him about this second document. (Mr. Johnston hands document to Mr. Scholz.)

Mr. Scholz: This is the one you are offering now?

Mr. Johnston: Yes.

The Court: Is there any objection?

Mr. Scholz: Well, if your Honor please, of course, I think our objection may come prematurely. We never received a copy of this, and I presume you are going to ask him if he sent us a copy and, of course, our objection would be, anyway, that it is not binding upon us, because under our theory of the case this deal is entirely between Pioneer and Cleveland at this time.

The Court: You object to it now. Does the evidence show that he received a copy of that?

Mr. Johnston: Your Honor, no copy. I don't think a copy was sent to these gentlemen, was it, Mr. Beaumont? [49]

The Witness: Not to my knowledge. [50]

* * *

Q. (By Mr. Scholz): Isn't it a fact that your own witness testified yesterday, Mr. Coombs, that the lumber was paid for on delivery and I asked him if it wasn't marked c.o.d. and he said yes and that it was paid for on delivery? [64] Is that correct?

A. The records would show that. I don't know.

Q. I mean you have nothing to contradict these records, have you? A. No.

Q. That is——

A. You mean the Hammon Company records?

Q. Yes, or your record on that invoice.

A. I have nothing to contradict either the Hammond Lumber Company invoices or the Pioneer Lumber Company invoices.

Mr. Scholz: That is what I wanted to bring out. Now, those invoices from the Pioneer Lumber Company to Cleveland, Exhibits 9 and 10, were the only invoices you received, is that correct?

The Witness: For these two cars of siding?

Mr. Seay: Yes.

The Witness: Yes.

Q. (By Mr. Seay): You never received any from Allied? A. No.

Q. And those invoices received, referring again to Exhibits 9 and 10 from Pioneer to Cleveland, were received in the ordinary custom of the mail? I mean, they were duly delivered in a due course of mailing the invoices from Pioneer to you, is that correct? [65]

A. They were received in the mails.

Q. That is right, in the due course of mails. You have nothing to contradict that, have you?

A. Only the fact that they were received after we had paid for the two cars of lumber, after——

Q. That is right, in the ordinary course of mail.

A. In the ordinary course of mail, but not in the ordinary course of invoices being received. We normally receive invoices before we pay for the cars, but, in this case, we received them afterward.

Q. You are a hundred per cent correct. I agree with you, a hundred per cent, on that.

A. Yes, sir.

Q. Now, Allied Lumber Company—now, to shorten it, I will refer to Allied Lumber Company as "Allied" so we will be clear on that.

A. Yes.

Q. (By Mr. Scholz): Allied never invoiced you, as you stated, nor did they ever send you the bill of lading, did they, on this lumber? A. No.

Q. The bill of lading you received was from the Pioneer Lumber Company, isn't that correct?

A. We received them from the bank.

Q. Yes, the Bank of America, 8th and Vermont, Los [66] Angeles, California, is that correct?

A. No. We received them from our bank in Cleveland whom the Bank of America forwarded them to.

Q. It was forwarded by the Bank of America, 8th and Vermont Streets, Los Angeles, to your bank in Cleveland? A. That is correct. [67]

* * *

Mr. Scholz: May I see Exhibit 6, Mr. Clerk, please?

Q. Mr. Beaumont, through your counsel you offered in evidence Plaintiff's Exhibit 6, which states, "We Hold Bill of Lading," designating the car. A. SL and SF 149239.

Q. Yes, and I believe you testified yesterday that you received this telegram, is that correct, from the Bank of America, 8th and Vermont Street?

A. That is right.

Q. And you will note on there that it states, "We Hold Bill of Lading to Car SL and SF 149239 and Invoice Covering 60,000 and 5/8 by 8 Redwood Siding Net Amount 7,543. Have Your Bank Wire Us Funds for the Account of Pioneer Lumber Co.," signed "Bank of America NT&SA 8th and Vermont Branch," dated December 3, is that correct?

Well, there are two dates on there. One is December 2nd and the other December 3rd, due to the difference in time.

A. We received that telegram at 9:10 a.m. on December 3.

Q. That is right. A. That is right.

Q. I am calling your particular attention to "For the Account of Pioneer Lumber Co." When you received that wire, [70] you did so wire in accordance with that instruction, did you not?

The Witness: Could I look at my file just a minute?

Mr. Scholz: Certainly.

The Witness: I think there were two or three wires from the Bank of America.

Mr. Scholz: You have them in the exhibits there. I am just asking you about one. There are two wires, as I recollect, but I can't cover everything at one time. I have to take one thing at a time. I am referring to this particular wire right now.

The Witness: That is the reason why I want to give you the right answer.

Mr. Scholz: Let me see those checks.

The Witness: My records indicate that this payment of December 5th of ours was in answer to this Exhibit 6.

Q. (By Mr. Scholz): Now, referring to Plaintiff's Exhibit 4—may I have that, Mr. Clerk? Would you mind handing that to him?

The Clerk: Certainly.

Mr. Scholz: Now, that telegram is dated November 19, 1947, is it not? A. That is right.

Q. And that telegram also refers to the Pioneer Lumber Company, in other words, is simply states that the "Pioneer [71] Lumber Requires Telegraphic Funds" upon "Presentation" of "Bill of Lading Bank America Los Angeles," is that correct? A. That is part of the telegram.

Q. And then the money which you forwarded to the Bank of America was pursuant to the telegrams from the Bank of America, Los Angeles, and also this wire, Plaintiff's Exhibit 4, is that correct?

A. That appears to be correct.

Q. Now referring to the freight bill, you never called Allied's attention in any way or sent them any telegrams or wires or in conversation of any

kind called their attention to these, to these freight bills?

A. Called attention to the freight bills——

Q. I want to make it clear. What I am trying to get is this, is that the freight bills show that the Pioneer is the shipper, you see. Now, I want to know if you have any knowledge that Allied's attention was called to these freight bills.

Mr. Johnston: Just a minute. I am going to object on that. The question violates the best evidence rule. A letter of December 18th from Cleveland to Allied demands money back, purchase price plus expenses.

Mr. Scholz: No, that doesn't answer the question. It is not the best evidence, your Honor, because I am asking him if he has any wires, telegrams, or had any conversations of [72] any kind that show that he called Allied's attention to the freight bills. I am not talking about any expenses. That is a general question.

The Witness: Called Allied's attention to the freight bills, for what reason?

Mr. Scholz: I don't know. I don't think you did. I want to find out. I don't believe you ever called Allied's attention to these freight bills, and that is the question I am asking you.

Have you anything in your file or do you know of anything where you called Allied's attention to the freight bills which are offered in evidence?

A. Our telegram to Allied on December 13th. We said that we were drawing sight draft for the

entire amount paid in advance by ourselves, which would have included freight.

Q. Drawing sight draft upon whom?

A. It does not specifically say——

Q. I beg your pardon?

A. It does not specifically refer to freight.

Q. December 13th? A. That is right.

Q. Now, Mr. Beaumont, doesn't that read that you are drawing sight draft upon the Pioneer Company for the entire amount? Doesn't that so read?

Let me have Plaintiff's Exhibit 13. [73]

Mr. Beaumont, here is Plaintiff's Exhibit 13 which was offered in evidence by you yesterday and I call your attention to the fact that it states here, "We are drawing sight draft on Pioneer Lumber Company for entire amount paid in advance by ourselves." A. Entire amount.

Q. Yes.

A. That would include freight.

Q. Well, of course, I am not arguing with you on the terms.

A. Well, you asked if we ever mentioned freight charges to Allied and in that telegram we say that we are drawing for the entire amount. That would have included invoices, freight, demurrage and reconsigning.

Q. Now, in this telegram where does it state anything about freight? Does it say anything in there about freight? A. No, sir.

Q. That is right. Does it say anything about storage? A. No.

Q. Does it say anything about reconsignment?

A. No.

Q. Does it say anything about demurrage?

A. No, not in this telegram.

Q. That is right.

Now, I am asking you that question again, Mr. Beaumont: [74] Have you any documents of any kind that will show that you called Allied's attention to the freight bills?

A. The freight bills specifically, no.

Q. That is right. Now, referring to Plaintiff's Exhibit 18—may I have that, Mr. Clerk—this is Plaintiff's Exhibit 18. This is a letter dated 12-18 from Cleveland to Allied, and just to clear it up, this letter is signed by Mr. McGuire, isn't it?

A. That is right.

Q. (Continuing) ——who was the vice president.

A. He is the vice president.

Q. Who was and is. A. That is right.

Q. And your counsel asked you if you signed that and I think that you stated in reply that if you signed that lettter, you stated that the company sent it out. A. That is correct.

Q. Yes. In other words, to clarify that, this Plaintiff's Exhibit 18 which among other things states—I can't read the whole thing but I just want to get this one point—"I think that you, along with us, have been victims of circumstances; all of which should have been observed when Pioneer demanded telegraphic funds from a company rated, as is the Cleveland Lumber and Door Company." That

meets with your approval, that is, the approval of your company, is that [75] correct?

Mr. Johnston: Just a minute. I am going to object to that question. The document speaks for itself. Whether it meets with his approval or not is beside the point. The document is in evidence and it has gone forward to Allied Lumber Company.

Mr. Scholz: The only think is I want to clear it up. I don't think it was properly identified because I think Mr. Johnston asked if he sent that out and he said the company sent it out and I just want to be sure if that had the approval of the Company to be sent.

Mr. Johnston: You mean whether it was authorized to be sent?

Mr. Scholz: Yes.

Mr. Johnston: I will stipulate that it was. [76]

* * *

Q. (By Mr. Scholz): Now, Mr. Beaumont, you never had any conversations with Allied Lumber Company yourself, did you?

A. With Allied Lumber Company?

Q. Yes, I mean personal conversation, you never talked [80] to Allied Lumber Company yourself, did you?

A. Never spoke to them directly.

Q. That is what I mean. A. No.

Q. And isn't it a fact that as far as this was handled, this transaction was handled mostly or practically all by McGuire of your company?

A. Practically all with Mr. McGuire?

Q. Yes.

A. As far as your records are concerned, then.

* * *

Q. Now, but this wire also states that you are drawing sight draft on Pioneer for the money and request Allied to urge Pioneer to accept it, is that correct? A. That is what the telegram says.

Q. That is right.

A. But we didn't do it.

Q. You didn't draw a sight draft on Pioneer?

A. No.

Q. Are you sure of that? A. Yes.

Q. Did you ever attempt to draw a sight draft on Pioneer? A. Yes.

Mr. Scholz: This is news to me.

Q. What did you do in regard to the sight draft, then, which you refer to in that wire?

A. We gave the total amount of the invoices, freight and other charges that we knew had accumulated, exactly, or as they were up to that time, and instructed our bank, the Union Bank of Commerce, to draw on Pioneer who we had in the meantime learned had received the bulk of the funds that we had wired to Allied, and our bank said, "Well, before we put this all in form for drawing on Pioneer, let us find out first whether Pioneer will pay it when it gets there or not."

So our bank communicated with the Bank of America and the [87] Bank of America communicated apparently with Pioneer and then called our

bank and stated that there was no need to drew a draft on Pioneer, that they wouldn't honor it, so the draft was not drawn.

Mr. Scholz: I see.

Q. Did you communicate this, these facts which you have told me, to Allied?

A. I can't say definitely whether or not our Mr. McGuire in telephone conversation advised your Mr. Estcourt that we had done this or had not done it.

Q. As far as you know, it was not communicated, is that correct, to Allied?

A. Yes, it was indirectly communicated in our letter of November 18th, which detailed everything practically up to that time when we asked you to please——

Q. Wait a minute.

A. ——give us our money back.

Q. On December 18th. Does that refer to any sight draft? A. No.

Q. Do you refer to this, that you asked your bank to sight draft the Pioneer Lumber Company and the bank stated they would find out whether Pioneer would pay it, first, and Pioneer said they wouldn't, does it say anything about that in that letter? A. It was December 13th. [88]

Q. No. Answer my question.

A. It doesn't mention a sight draft in this letter, no. It just says that we are looking to you or others for our money.

The Court: We will recess for 10 minutes.

(Whereupon a short recess was taken.)

Q. (By Mr. Scholz): Mr. Beaumont, referring to the complaint, the amended complaint that Cleveland filed against the defendants, it states—have you a copy in front of you—therein "December 15, 1947," among other things of course, "plaintiff rescinded said agreement," which in legal parlance of course is a legal conclusion, but the point I want to ask you is this: This rescission that you set forth in your complaint is not based on the telegram of 12-13, is it; 12-13, the telegram I believe from Cleveland to Allied, Exhibit 13?

A. That is the exhibit we were talking about just before the adjournment, referring to our drawing on Pioneer.

Q. Yes.

A. And you had asked whether we had told you that Pioneer hadn't honored that draft.

Q. Yes.

A. I find that, looking in our file here, that we advised you on December 16th of the action of the bank:

"Pioneer's Bank advises our bank as follows: 'Your instructions [89] as to disposition of bills of lading and cars of lumber shipped to Cleveland Lumber and Door Company should come from the Allied Lumber Company. Pioneer only producing mill.' "

That telegram was sent to you on December 16th, which advises you after we had informed you that we were drawing on Pioneer, that they weren't honoring——

Q. That is right.

A. ——and paying us.

Q. The point I am bringing up now is this: In your complaint, you state that on December 15, 1947, plaintiff rescinded said agreement.

Mr. Johnston: "On or about" is the way it is alleged.

Mr. Scholz: Yes, "That on or about December 15, 1947, by reason of the facts"—well, that doesn't continue my question. You alleged that plaintiff rescinded said agreement.

Now, I am asking you, that is not based on your telegram of 12-13, Plaintiff's Exhibit 13, I think, is it?

A. I don't think it is based on that one particular telegram, no.

Q. Of course, I am only speaking so far as Allied Lumber Company is concerned, now. Of course, you understand that, don't you? A. Yes.

Q. Upon what do you base your rescission as far as Allied Lumber Company is concerned, upon any telegrams or letters?

A. We based it on the order that we placed with Allied which we considered they filled in shipping these two cars and the fact that we directed our money to the Allied Lumber Company.

Q. That is all you based your rescission on?

A. Yes.

Q. And did you give any notice of rescission to Allied?

Mr. Johnston: Just a minute.

The Witness: I can't say definitely.

Mr. Johnston: Just a minute.

Mr. Scholz: He has already answered.

Mr. Johnston: All right. Very well.

Mr. Scholz: I don't want to preclude you.

Mr. Johnston: I don't think he understands the question, but I will bring that out.

Mr. Scholz: I don't want to take advantage.

Q. Did you understand that question?

A. I am not positive that I do.

Mr. Scholz: Mr. Reporter, will you read the question?

(Question read by reporter.)

Q. (By Mr. Scholz) (Continuing): Notice of rescission as far as the Allied Lumber Company is concerned upon any telegrams [91] or letters.

Mr. Johnston: Would you ask him if he knows what rescission means? That is a phrase employed by lawyers. If you will put that in layman's language and then ask him the question, I think he can answer the question.

Mr. Scholz: I don't think that is pertinent. He has his own interpretation of what rescission means, but I will say this, as a matter of law and my interpretation of law which may be wrong, too, that if you rescind a contract, you must rescind it promptly upon discovering the facts upon which you base the rescission and at that same time you must return everything of value which you received under the contract or offer to return everything of value. Now, assuming that that is the law or at

least that is what I mean by rescission, have you any papers, documents, letters, telegrams or any correspondence upon which you based the rescission as far as Allied is concerned and which you stated in your complaint?

Mr. Johnston: Just a minute. I am going to object to that on the grounds that the documents indicating rescission are already in evidence. There are a number of telegrams and a letter.

Mr. Scholz: I think he has a right to answer that question.

The Court: You mean if he has any others than what is [92] in evidence?

Mr. Scholz: Yes, your Honor. I put it that way, other than what is in evidence, yes.

The Court: He may answer that. Objection overruled.

The Witness: I don't know as there is anything other than what is in evidence.

Mr. Scholz: All right.

Q. Now, I will ask you this question: On what particular paper or document that is in evidence did you base your notice of rescission as to Allied Lumber Company?

Mr. Johnston: I object to that. It is incompetent, irrelevant and immaterial. He does not have to base it on any one or any particular document. He can base it on a series of documents.

The Court: Sustained.

Mr. Scholtz: I will amend that question to say this:

Q. Then, upon what document that is in evidence here or any series of documents that are in evidence here, do you base this rescission as to the Allied Lumber Company?

A. On our original orders to Allied Lumber Company and their acceptance of them.

Q. Now, upon what document in evidence or any series of documents in evidence do you base your notice of rescission to Allied Lumber Company, to wit, offering to return everything of value received, to wit, the lumber I presume in [93] this case, or offering to return everything of value or the lumber and demanding in return that you be refunded your money?

A. Well, I would say in addition to the various exhibits that are now on record in the form of telegrams, that our letter of December 18th, the second to the last paragraph in which we say, "Please let me hear from you immediately, either with your check—or somebody's check to cover"——

Q. Do you recall what the exhibit is?

A. I don't know what exhibit it is in the file.

Q. That is the letter of December 18th?

A. Our letter to Allied Lumber Company.

Mr. Scholz: Would you mind handing this to the witness? That is Plaintiff's Exhibit 18, is that correct?

The Witness: That is right.

Mr. Scholz: Mr. Clerk, is there a telegram from Cleveland to Allied dated December 16th in evidence? I think Mr. Beaumont read from it just recently.

Q. Do you have that copy of that telegram, Mr. Beaumont? A. Yes.

Q. May I see it? This is the one.

Mr. Johnston: It is not in evidence, Mr. Scholz. Here is a copy of it. I am going to offer it later.

Mr. Scholz: All right. I will return these for your [94] file.

Mr. Johnston: All right.

Q. (By Mr. Scholz): Mr. Beaumont, you just referred a few minutes ago to a telegram from Cleveland to Allied Lumber Company, that the bank advised you that the bills of lading, as to disposition of bills of lading of cars of lumber shipped to Cleveland should come from the Allied. Now, I hand you herewith a copy of that telegram which I received from your counsel and ask you if this is a correct copy of that to which you referred.

A. To the best of my knowledge.

Q. And that states that the Pioneer bank advised your bank among other things——

A. That Pioneer's bank advised our bank.

Q. That is right.

Mr. Scholz: I will offer this for the purpose of identification, and then offer it in evidence.

The Clerk: Marked Defendant Allied's Exhibit C for identification.

(Said document so offered was marked Defendant Allied's Exhibit C, for identification.)

* * *

Q. I am asking the question. You knew then,

did you not, on that date that the Pioneer's bank was the Bank of America here in Los Angeles?

A. On December 16th, yes.

Q. On December 16th, yes?

A. That is correct.

Q. Now, you knew before then, too, did you not? You knew, as a matter of fact, from the telegram from the Bank of America itself which says, "Wire" this bank "for the account of Pioneer Lumber Company"? That is that telegram of December 2nd. A. December what?

Q. It is dated December 2nd and received December 3rd, Exhibit 6.

A. We received that telegram.

Q. Then, you knew then, did you not, that the Bank of America was representing the Pioneer Lumber Company?

A. We did at that date and we had also had a telegram [107] from the Bank of America asking for funds covering the first car on November 29th, in which they made no mention of who they were representing.

Q. It was sent from that bank, that is correct, and which you received on December 1st?

A. Received November 29th.

Q. No. That was the date of it and you received it December 1st. Look at the bottom of that telegram.

A. I don't have the telegram. I am just looking at my notes. It has been put in the file as an exhibit.

Q. It is Exhibit 5. May I state, then, that that is what it so says, I note.

A. We paid the funds requested on this, in that wire, on November 29th.

Q. It is dated November 29th and received December 1st, that is correct, isn't it? Doesn't it so state on the telegram?

A. That is the date that is stipulated on there.

Q. Yes. And then you also received this other telegram dated December 2nd, received December 3rd, and that telegram stated "For the account of Pioneer Lumber Company," from the Bank of America, both telegrams from the Bank of America, and you knew at that time that the Bank of America was Pioneer's bank representative, is that correct? A. At that second date. [108]

Q. And the payments were made—may I have the photostatic copies of the checks? And the checks from the Cleveland to your own bank were dated November 29, 1947, and December 5, 1947, that is correct, is it not?

A. That is correct.

Q. And those funds were thereafter transmitted by your bank in Cleveland to the Bank of America at Eighth and Vermont Street here?

A. That is correct.

Q. Now, you also knew that on November 19th, by virtue of a telegram from the Allied to Cleveland, Exhibit 4, that the Bank of America was Pioneer's bank and representative?

A. Pioneer and the Bank of America are referred to in this telegram. [109]

* * *

Q. No, that isn't the question. Whether you were dealing with us is a question for the court to determine. I am asking you. You can say yes or no. Did you know at that time, did the Cleveland Lumber Company know on November 19th or November 20th that the Bank of America here in Los Angeles were representing the Pioneer Lumber Company? You can answer that yes or no.

A. I can't answer it properly yes or no. We knew that they were representing them in this transaction.

Q. All right. And you testified you got the bill of lading from the bank which was sent to your bank in Cleveland? A. That is right.

Q. Then, you also received a telegram from the Pioneer's bank, did you not? I mean these telegrams from the Pioneer's bank.

A. They were from the Bank of America.

Q. That is right, and then there was also a letter by you, through your attorneys, served upon by the Pioneer's bank, was there not? That is the letter that is dated—offered for identification.

A. What was your question about this letter?

Q. That letter was served upon the Pioneer Lumber Company [110] by your attorney, was it not? A. That is correct.

Q. I am referring to document for identification No.——

The Clerk: That is Defendants' Exhibit A.

Q. (By Mr. Scholz) (Continuing): ——Defendant Pioneer's Exhibit A.

The Clerk: Defendant Pioneer.

The Witness: Letter dated February 19, 1948.

Mr. Scholz: Yes.

The Clerk: For identification.

Mr. Scholz: That is right.

Q. You received no other bills of lading outside of that one that was offered in evidence, is that correct, Mr. Beaumont, in regard to this transaction? A. Not to my knowledge.

Q. You stated in response to a question by your attorney that you are willing to deliver the lumber upon the payment of the amount that you paid for the lumber, is that correct? Do I state it correctly?

A. The amount I paid and charges.

Q. And charges, is that correct?

A. That is correct.

Q. Your position is, now, that you are holding that lumber for the benefit of Pioneer and Allied Company, both?

A. We are holding it for the Pioneer—Allied and [111] Pioneer.

Q. That is right, for the benefit of the Allied and Pioneer.

A. For the benefit of Allied, whom we paid our money to.

Mr. Scholz: Will it be stipulated, Mr. Johnston, that you advised me that the lumber is being held for both the benefit of the Allied and Pioneer?

Mr. Johnston: It will be so stipulated. Will you give the date of that?

Mr. Scholz: Yes. That is in response to a question of mine.

Mr. Johnston: The date of the letter that you have in your hand there?

Mr. Scholz: Yes, July 9, 1948, in response to a query from me to Mr. Johnston July 6th as to whose benefit the lumber was being held Mr. Johnston stated for the benefit of both Allied and Pioneer. Is that correct?

Mr. Johnston: That is correct. [112]

* * *

The Witness: In which line is this statement made?

Mr. Scholz: That is what I am going to find. They made an extract, a copy for us. Yes, paragraph 2, "Answering paragraph 3 of said amended complaint the defendant admits that plaintiff paid defendant said sum of $16,808.05 as agent for co-defendant Allied Lumber Company." That is correct, is [160] it?

The Witness: I would like to read it, if you please.

A. That is right.

Mr. Scholz: That is correct.

Q. And did you state in your answer—you may look at it further, if you wish—that the lumber was to be Grade A and Air Dried?

A. Where will that be in here? Will you tell me what paragraph it is?

Q. You have got the file. I can't.

The Clerk: You can step over there.

Mr. Seay: I submit that the answer is there and it speaks for itself.

Mr. Scholz: I think so, too. In this conjunction, I will offer the answer of Mr. Bandy in evidence at this time.

The Court: Admitted. There is no objection.

The Clerk: It will be marked defendant Allied's Exhibit H in evidence.

(Said answer of defendant Bandy to amended complaint was marked Defendant Allied's Exhibit H in evidence.) [161]

* * *

Mr. Seay: Well, at this time, your Honor, I think so far as the defendant Pioneer is concerned, the proof fails to state a cause of action against the defendant Pioneer Lumber Company and C. L. Bandy.

Now, there has been certain testimony injected in here by insinuations that the Allied shifted the cause of action or the transaction over to the Pioneer. However, we are not trying the case pending between Allied and Pioneer in this lawsuit. That case is still pending. The court has denied the Allied's motion to consolidate, and by striking that evidence which doesn't apply in this case, I think a judgment should be for the defendant at this point, the defendant Pioneer. [194]

I don't believe there is any connection of a cause of action shown by the evidence at this time. All the evidence indicates, which has been produced so far, and shows that the Pioneer was acting as agent

for the Allied in covering this order. Now, there is a question of whether the judgment should go against the principal or the agent, and I contend that there is no proof to tie this defendant as a principal.

The Court: What have you to say?

Mr. Johnston: Your Honor, it is not necessary to tie this defendant, that is, Pioneer, in as a principal in an action of this character, an action of rescission. Rescission may be had and restitution ordered against any party to the transaction who receives consideration, knowing of a fact that a warranty has been breached or knowing of the fact that a representation has been made. Assuming for the sake of argument that Pioneer is an agent, Pioneer participated in the wrongdoing here to the extent that Pioneer invoiced lumber that was admittedly green lumber, as dry lumber. Pioneer received the consideration that was paid for dry lumber, having participated in the sale of green lumber.

Pioneer was fully aware of the fact that this lumber that was shipped to Cleveland did not meet the requirements, and I submit Pioneer was guilty of fraud, but whether fraud is established or not, that is not necessary to our case. All that is necessary to hold Pioneer is the fact that [195] Pioneer received the consideration or a part of the consideration paid for green lumber when that lumber was supposed to be air dried. Pioneer received that

money, knowing of the facts and now should be compelled to restore the consideration.

The Court: Under the pleadings and the evidence so far and the principle of law applicable, the motion will be denied.

You may proceed.

Mr. Scholz: If your Honor please, I also have a motion. This is a motion to elect upon behalf of the plaintiff. There is considerable law upon this.

The Court: Yes, there is.

Mr. Scholz: And I have quite a number of authorities and probably Mr. Johnston and Mr. Seay have also quite a number of authorities, but just briefly, to bring before your Honor my motion, which is a motion to elect, to require the plaintiff to elect whether they will proceed against the Pioneer or Allied, I call your Honor's attention to Craig vs. Buckley, 218 Cal., page 78, and let me read briefly from some of the points in that case. I think that I can put that point better in that way than I can in oral argument.

"The rule upon this subject is well settled that while the plaintiff may bring the action against both the agent and the undisclosed principal, he may not have judgment against [196] both, but before the close of the case, must elect whether he will take judgment against the one or the other. This rule, however, is subject to an exception, or modification, which holds that the right to compel an election is waived by failure to demand or move for that remedy during the course of the trial." Then citing cases.

The case just cited was followed by the Supreme Court of California in a recent decision, wherein is found the following statement of law:

"It is contended that where suit is brought against an agent and the undisclosed principal is joined, the plaintiff must prior to the judgment elect to hold one or the other. This is undoubtedly the rule, and it is fully discussed in the recent case of Klinger v. Modesto Fruit Co., Inc., supra, but it was there held also that the principal who desires to take advantage of the rule must raise the point in the trial court by demurrer, motion or otherwise; and that a failure to demand such an election in the lower court constitutes a waiver of the right. There is no evidence in the record of such demand and the point is therefore not well taken."

So, your Honor, my own opinion is that we should make the motion, now, and that I don't want to proceed to tell the court what to do, but take it under advisement and dispose of it at the conclusion of the case, but I want to preserve our rights and have the record show that we do, at this time, at the finish of the case as far as the plaintiff is concerned, make this motion and that we will also make the motion at the end of the case unless your Honor would be agreeable that it be deemed that we make that motion at the end, too, to save time.

The Court: The court reserves ruling on this motion at this time and you may proceed, and it will be disposed of in the final determination. [198]

* * *

Q. Well, do you know that the Pioneer instucted the Bank of America, Eighth and Vermont Street, to forward the [230] bills of lading to Cleveland and the invoices, provided that they paid for it, do you know that?

A. I didn't know it until I got here.

Q. Do you know it, now?

A. I know it now. [231]

* * *

Q. (By Mr. Scholz): Mr. Davis, what is your occupation? A. Banking.

Q. You are the branch manager of the Bank of America, Eighth and Vermont Street, Los Angeles, California? A. Yes, sir.

Q. And how long have you been in that bank?

A. You mean in that Bank of America branch?

Q. Yes. A. Ten years, 11, 11 years.

Q. And during that last ten years you had business dealings [239] with the Pioneer?

A. Yes, sir.

Q. You are now having business dealings with the Pioneer? A. Yes. [240]

* * *

Q. May I refresh your memory by showing you Plaintiff's Exhibit, I think it is 6, 5 and 6. Now, Plaintiff's Exhibits 5 and 6 are copies of telegrams sent by the Bank of America to the Cleveland Lumber and Door Company, are they not?

A. Yes, sir.

Q. Now, you sent those wires to the Cleveland Lumber and Door Company pursuant to instruc-

tions received from the Pioneer Lumber Company?

A. That is right.

Q. The instruction from the Pioneer Lumber Company was that the Cleveland Lumber and Door Company was to pay to your bank, for Pioneer Lumber Company, this amount of money? [241]

* * *

The Clerk: Marked Plaintiff's Exhibit No. 31 in evidence.

(Said document so offered and received in evidence was marked Plaintiff's Exhibit No. 31.) [254]

* * *

Q. Now, calling your attention to defendant Allied's Exhibit Q, the letter dated December 8, 1947, which reads in part as follows:

"Enclosed you will find our cashiers check #3059020 for $811.58, which is your commission on car #SL&SF—", number so-and-so.

Now, were you instructed by Pioneer to insert the word "commission" in there?

A. No, sir. Just a matter of speech is all it is.

Q. And you don't know whether——

A. Whether it is commission or not commission.

Q. (Continuing): ——whether Pioneer is the agent of Allied or the principal of Allied?

A. I don't know as they have any connection other than as that telegram released.

Q. In other words, when you used the word "commission," you were picking a word out of the air, as a matter of fact?

A. That was just a matter of assuming that it was that and sent it.

Q. But you did not know what the legal relationship was, nor you don't know now, between Pioneer and Allied?

A. No, nor do I know, now, only from what I have heard right here.

Mr. Johnston: I have no further questions of this witness. [255]

Mr. Seay: No questions.

Examination

By Mr. Scholz:

Q. Mr. Davis, on the examination by myself, you stated that all funds were paid to Pioneer and then I think you truthfully corrected it.

A. That is right.

Q. And correctly stated that you paid all the funds to Pioneer excepting the amount which you forwarded to the Allied Lumber Company. Is that correct? A. Yes, sir, that is correct.

Q. And the amount which you forwarded to the Allied Lumber Company is the amount which is set forth in Allied's Exhibit Q, is that correct?

A. Yes.

Q. That was the amount? A. Yes.

Q. And all the other amount was paid to Pioneer Lumber Company?

A. There wasn't any other amount.

Mr. Scholz: Now, wait a minute.

The Witness: That figures out the amount that we got from them.

Mr. Scholz: Wait a minute. This is——

The Witness: Oh, I understand what you mean.

Mr. Scholz: I don't want to get you off wrong.

The Witness: Yes.

Mr. Scholz: This only figures out $811.58——

A. That is right. I see what you mean.

Q. ——and $772.52.

A. Yes, the balance.

Q. And that is what you forwarded to the Allied Lumber Company, what you stated as commissions and the balance was paid to the Pioneer?

A. Yes, sir, that is right.

Mr. Scholz: We all agree on that. That is all.

* * *

(Said letter so offered and received in evidence was marked Defendant Allied's Exhibit I.)

Q. (By Mr. Scholz): And then you received the order from Cleveland Lumber and Door Company, dated 10-3-47, that is, that is the date of the order, and it was one order—well, they are both dated 10-3-47—it refers to order No. 1249 and order No. 1250.

A. Yes, we received those.

Q. And these are the original orders that you received? A. That is right.

Mr. Scholz: I offer them in evidence as one exhibit, I guess, or you can make it two.

The Court: Admitted.

The Clerk: Defendant Allied's Exhibit S in evidence, they both being marked the same.

(Said documents so offered and received in evidence were marked Defendant Allied's Exhibit S.)

Q. (By Mr. Scholz): And I call your attention to this paragraph here that is stated in print, "Freight net cash, and balance less 2% for cash 10 days from delivery, or 60-day note from date of invoice." A. Right.

Q. And then there is typed up in above there, "Terms: 1% 10 days from arrival"——

A. Yes. [273]

Q. (Continuing): What is your interpretation of that statement?

Is that permissible?

Mr. Johnston: I don't think—oh, he might state what his understanding of it is, I suppose.

The Court: All right, he may state it.

The Witness: My understanding is that the 1% superseded the 2%, as we were not in the habit of allowing 2%, but, if the payment was made in the time given, we would allow a 1% discount; if not, that there would be a further period of time in which it was to be paid on net basis.

Q. (By Mr. Scholz): You mean that if they paid in 10 days after arrival, they would get 1% off? A. That is right.

Q. Or they would have 60 days from the date of invoice? A. That is right, yes.

Q. And this in ink here "Please Rush All Possible," was that written on there at the time you received the order?

A. Yes, as far as I remember, it was.

Mr. Johnston: May I see the ink statement on there?

Q. (By Mr. Scholz): Now, you acknowledged receipt of this order from the Cleveland Lumber and Door Company, did you not? A. Yes. [274]

Q. On October 14, 1947?

A. That is right.

Q. And you said, "All conditions outlined will be complied with"? A. Correct.

Mr. Scholz: I offer that in evidence.

Mr. Cashin: It is the same as Exhibit 3.

The Court: Admitted.

Q. (By Mr. Scholz): Then I hand you herewith a letter from the Pioneer Lumber Company, dated October 21, 1947, being defendant Allied's Exhibit K for identification, and ask you if you did not receive that letter.

A. Yes, we received the letter.

Q. And that letter in brief confirmed their statement that they could furnish one to two million feet air dried or kiln dried lumber? That is not a complete statement. It is just to identify it.

A. Yes.

Mr. Scholz: I offer that as Allied's Exhibit K.

The Court: Admitted.

The Clerk: That is the Defendant Allied's Exhibit K for identification and is marked Defendant Allied's Exhibit K in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit K.) [275]

Q. (By Mr. Scholz): I also hand you herewith a carbon copy, what purports to be a carbon copy, from Allied Lumber Company to Pioneer Lumber Company, dated October 2, 1947, referring to order No. 10359, to which is attached a supplement to that order and referring to order No. 10359, and ask you if that is the exact copy which you sent to Pioneer Lumber Company, and I refer now to Defendant Allied's Exhibit O for identification.

A. That is an exact copy of the original as transmitted.

Q. And also for Allied's Exhibit P for identification? A. The same answer.

Mr. Scholz: I offer that in evidence, then.

The Court: Admitted.

The Clerk: Marked Defendant Allied's Exhibit O in evidence and Exhibit P in evidence.

(Said documents so offered and received in evidence were marked as Defendant Allied's Exhibits O & P.)

Q. (By Mr. Scholz): And then I hand you herewith a copy of a letter which is Plaintiff's Exhibit No. 26, I believe in evidence, dated October 9, 1947, in which the Pioneer acknowledged receipt of the order No. 10359 and that "All conditions as outlined in your letter and appearing on the order are applicable and will be complied with." And you received that letter? [276]

A. The letter, as I remember it, is that this is a copy, counsel. It appears to be exactly the same as

the original that I remember receiving, that the would comply with it.

Q. Well, is there any question in your mind o would you prefer to see the original letter?

A. I think I should see the original, if I may.

Mr. Scholz: All right. May I see the origina letter of October 9th from Pioneer? I think that Plaintiff's Exhibit 26. That is a copy, too. Hav you got the original letter? No, no. We woul have it.

The Witness: If your Honor please, may I an swer that question again?

The Court: Yes.

The Witness: Since I know that all your copie in those files were obtained from originals give by me to you, I would answer that that is a corre copy of the original.

Mr. Scholz: All right. Then I offer that——

Mr. Cashin: Here it is, Mr. Scholz.

Mr. Scholz: Oh, yes, here it is. (Mr. Scho shows document to the witness.)

The Witness: Yes, this was received.

Q. (By Mr. Scholz): The same thing?

A. Yes.

Mr. Scholz: Then I offer this in evidence. N not this [277] one.

The Clerk: You are offering this as a defen ant's exhibit, also?

Mr. Scholz: Yes.

The Court: Admitted.

The Clerk: Defendant Allied's Exhibit T in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit T.)

Q. (By Mr. Scholz): And then I show you a letter, Pioneer's Exhibit L in evidence. This is a copy of that Exhibit L—— A. Yes.

Q. ——and ask you if you received that letter sent by Pioneer to yourself.

A. Yes, I did receive that letter.

Q. Now, in that letter there, it says:

"I showed Dukes some siding at one of our shipping points. It just happened that no Kiln Dry was being loaded at that time. However, he did see the pattern 400 shorts, which are Kiln Dry and bone dry. He was in a hurry to leave, and I was in a hurry to get rid of him because he was looking for siding dried down to 700 pounds as shown in the Redwood Association Book. We do not have time to dry it to that extent, if we did, the cost would be prohibitive. Our Kiln Dry weighs from 900 to 1,000 pounds. Air Dry from 1,000 to [278] 1,200 pounds. You can imagine what facilities would be needed to completely dry from one to three cars every day.

"We would like to point out a few facts concerning this item. It is manufactured from special stock selected over a long period of time for its fine texture, and thoroughly dried by air and kiln down to 700 pounds in its rough state. This will be the

first running of this item since before the war. It is impossible to manufacture such a finished product from the ordinary run of redwood not properly cured. It takes an average of 180 days from the time this stock is selected to get it in proper condition for milling. We now have 1½ million feet and will start milling when we receive orders for the first 200,000 feet, the equivalent of two carloads. We can promise car numbers and shipment within a very few days after orders are received.

"Please note that the detail has not been scratched out as in the general run of so-called combed products, instead, it has been perfectly milled. The samples sent to you are truly representative of the entire milling.

"Due to the tremendous scarcity of good interior finish, we feel that the present 12 carloads will not be with us long, now that our customers have seen the samples.

"Its main uses would be for dens, dining rooms and living rooms, in fact the entire interior of a house; also, for certain outside finish or complete siding. It absolutely cannot [279] be beat for office interiors.

"It is all ⅜" x 6", 8 to 20 feet long; short pieces 10 to the bundle; long pieces 8 to the bundle, A Grade and Btr.," (Better) "and Better, perfectly clear. Guaranteed not to exceed 800 pounds shipping weight. Carloads average 100,000 feet to the car and can be loaded with ½ car of Bevel siding. Price: $130.00 per" thousand, "surface measurement" I guess that is, "MSM."

A. Yes.

Q. (Continuing): "——F.O.B. Los Angeles."

Now, did you receive that letter?

A. Yes, I did.

Q. Did that have any connection with this particular deal here?

A. Not that I know of. It refers to a Mr. Dukes from South Carolina.

Q. Now, I hand you herewith a letter from the Pioneer Lumber Company, dated October 25th. Well, I don't think that is—you mean you want it in?

Mr. Johnston: I can't tell. Let me see it.

(Mr. Scholz hands document to Mr. Johnston.)

Mr. Johnston: It does not make any difference. I don't want it in. I don't want any of this in. I think it is all cluttering up the record.

Q. (By Mr. Scholz): I hand you herewith a copy of a letter [280] dated November 5, 1947, which is in evidence. Have you the exhibit number? Have you that one of November 5th? I want to show it to the witness. It is a letter from Pioneer to Allied.

Well, I offer it in evidence.

I hand you herewith a copy of Plaintiff's Exhibit 27, from Pioneer to yourself, and did you receive that? A. Yes.

The Clerk: Are you offering yours?

Mr. Scholz: Yes, I offer mine in evidence.

The Court: It will be admitted.

The Clerk: Defendant Allied's Exhibit U in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit U.)

Q. (By Mr. Scholz): Now, refreshing your memory from this letter, which is Defendant's Exhibit U in evidence, that in brief refers to the Pioneer demanding money in advance for the shipment of lumber to Cleveland, does it not? A. Yes.

Q. Prior to that time, Pioneer had agreed to send the shipment to Cleveland upon the terms that Cleveland had set forth in their order to you, is that correct?

Mr. Johnston: Wait a minute.

Mr. Scholz: It is in evidence.

Mr. Johnston: Will you state that again? [281]

Mr. Scholz: Mr. Reporter, will you read the question?

(Pending question read by reporter.)

Mr. Johnston: Had agreed with you, that is, Pioneer, is that what you meant to say?

Mr. Scholz: Yes.

Mr. Johnston: Very well.

The Witness: Yes.

Q. (By Mr. Scholz): Now, this changed that original order, did it not? A. It did, yes.

Q. In what respect?

A. In that it changed the terms of payment.

Q. In other words, how did it change the terms of payment?

A. Well, originally, the order was to be delivered in the regular course of business, whereby we were to be billed per our instructions, so that we in turn could bill the consignee, and after receiving the money from the consignee we would have transmitted the purchase price at that time to the supplier, Pioneer. Having requested speeding up of funds by telegraph, we thought we couldn't comply with it because it changed the original arrangement that we had with the buyer.

Q. And then what did you do then?

A. We communicated with not only this particular buyer, but later with others—I guess that is not relevant—stating [282] that the terms of payment had been changed and asked for approval to allow those changes.

Q. I hand you herewith what purports to be a wire from McGuire, Cleveland Lumber and Door Company, to Estcourt, Allied Lumber Company, dated November 19, 1947, and ask you if that was in response to a wire which you had made to—strike that question. I will get it in order.

Pursuant to this letter from Pioneer to yourself, dated November 5, 1947, did you then contact Mr. McGuire of the Cleveland Lumber and Door Company as to whether or not that would be agreeable with them?

A. To the best of my recollection, there was a conversation between me and Mr. McGuire at about this time in the middle of November, in which we discussed the matter of supplying this material, that we had made arrangements with Pioneer to

supply this material and that the original arrangement as to payment couldn't be complied with; therefore we were in the position of acting as a go-between, because we couldn't make arrangements—change the arrangements of the people who had agreed to purchase this lumber from us and under the original arrangement—therefore, in this case I revealed to Mr. McGuire the setup that we had with Pioneer, that we were originally buying it from them and were going to resell it, as we couldn't supply dry lumber ourselves, we had offered green, and were very glad to have obtained a source of [283] dry lumber, but we couldn't enter into an arrangement whereby we were coming in the middle and handling phone calls, and this and that, back and forth all the time; we felt that it would be best that the shipper and the buyer would deal directly with one another, and that we would obtain a commission on the material, which was the difference between the price they had originally quoted to us and the price we had quoted to the buyer.

Q. (By Mr. Johnston): What did McGuire say?

A. Mr. McGuire told me at that time, and I believe it has been testified to before, that he was very surprised that anyone should require telegraphic funds from the firm such as Cleveland Lumber and Door, with which fact I agreed, it didn't seem to me to be an essential fact, but since that was the only terms upon which the lumber could be supplied, they would agree to it, as is evidenced

by the telegram, providing that their 1 per cent discount could be protected, which we said that it could and if the Pioneer wouldn't absorb the 1 per cent, we would.

Q. That is, they agreed to the transmission of telegraphic funds?

A. That is right. I believe there are two wires to that effect, or one.

Q. (By Mr. Scholz): Now, on or about that time that you [284] had this conversation with Mr. McGuire, did you also advise him by wire, that is, McGuire—it is stipulated that Mr. McGuire is the vice president of Cleveland?

Mr. Johnston: Oh, yes.

Q. (By Mr. Scholz, Continuing): Did you also advise him by wire, and I call your attention to Plaintiff's Exhibit 4?

A. Yes, the wire of November 19th, in which we said that we could make no other arrangements except to have the telegraphic funds made and asked them to arrange it.

Q. That was to Pioneer?

A. This wire was to Cleveland.

Q. No. I mean the funds to Pioneer?

A. Yes.

Q. That they required?

A. That is right.

Q. In other words, "Our Supplier Pioneer Lumber Requires Telegraphic Funds Presentation Bill Lading Bank America Los Angeles."

A. Right.

Q. "Appreciate Your Advising Your Bank Accept And Advise Us Name Your Bank. Regret Cannot Arrange Other Terms."

That is the wire you sent?

A. That is it. [285]

Q. And then in addition to this and your telephone conversation with Mr. McGuire of the Cleveland Lumber and Door Company, did you receive a wire in reply to your wire which has just been offered in evidence? What was that one there?

The Clerk: The date? That is Plaintiff's Exhibit 4.

Mr. Scholz: And then in response—strike the rest of it out, will you, Mr. Reporter? I will reframe that question:

Q. In response to your wire to Cleveland, to McGuire, Cleveland Lumber and Door Company, of November 19th, which is Plaintiff's Exhibit No. 4, you received a reply back from McGuire, dated November 19th, that is, dated in Cleveland November 19, 1947, as follows:

"Rewire Okay To Ship Car Provided Car Cash Discount Covered Per Order Our Bank Union Bank of Commerce Cleveland."

A. Yes, that wire was sent.

Q. "F. T. McGuire Cleveland Lumber And Door Co." A. Right.

Mr. Scholz: I offer this as defendant's exhibit next in order.

Mr. Cashin: That was Exhibit B.

Mr. Scholz: Oh, yes, Exhibit B. It was Exhibit B for identification. Mark that B. [286]

The Court: Admitted.

The Clerk: Defendant's Exhibit B for identification is marked Defendant Allied's Exhibit B in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit B.)

Q. (By Mr. Scholz): I believe you stated that the Cleveland had no objection, so far as you know, to this arrangement.

Mr. Johnston: Wait a minute. He did not state any such thing at all.

Mr. Scholz: I am sorry, I did not hear it.

Mr. Johnston: He stated that Mr. McGuire raised no objection to telegraphic funds.

The Court: Do you object?

Mr. Johnston: I do object, your Honor.

The Court: Sustained.

Mr. Scholz: All right.

Q. Now, what other conversation did you have with Mr. McGuire of the Cleveland Lumber and Door Company, if you recall?

A. The original conversation was in the——

Q. I mean in regard to this change in the order, by which payment was to be made before the lumber was received.

A. There was no further conversation specifically with regard to that payment phase of it, so far as I remember. [287] There was a later one——

Q. Now, have you given the conversation which you had with Mr. McGuire on or about November 19th, to the best of your recollection?

A. Yes. I say it was somewhere in that period. Exactly, I don't remember.

Q. And was there any mention in there, in that conversation, about that Pioneer would pay your commission, nevertheless, and that you——

Mr. Johnston: Just a minute. I object to the question. It is leading in form.

The Court: Sustained.

Q. (By Mr. Scholz): Was there any mention in there about commission, in your conversation?

Mr. Johnston: Just a minute. It is a leading question. Ask him what the conversation was—in fact, you have already asked him and I think he has answered it.

The Court: Sustained.

Q. (By Mr. Scholz): Now, is there anything further in that conversation with Mr. McGuire of Cleveland Lumber and Door Company, on or about November 19th, that you recall at this time?

A. Nothing other than what I have said, that I recall.

Q. Now, after these arrangements were made in regard to the payment for the lumber by Cleveland to Pioneer, did [288] you hear anything further in regard to that matter?

A. In regard to the payment?

Q. No. With regard to the matter.

A. With regard to the matter, I believe there shipped, that is all.

Q. And they asked you to hurry? By that I was a notification of the cars which had been

mean Cleveland, prior to this, had asked you to hurry the shipment?

A. There had been constant urging, not only on the part of Cleveland, but by others, to hurry up the shipment. We had been promised 10-day deliveries on these things, to start with.

Q. Then, after notification of the car being shipped, did you hear anything further from this matter?

A. Nothing until I got a notification by telephone, I believe around December 11th, from Mr. McGuire, that the cars were wetter than hell. May I correct that answer in just one point: There was one part about the receipt of the payment in the bank. That is, one other connection in regard to those cars, that I omitted to mention.

Q. Oh, yes. Let us go back, then. Did the Allied Lumber Company have any dealings whatsoever with the Bank of America, Eighth and Vermont Street, Los Angeles, prior to the receipt of the funds Cleveland had sent to it in this matter?

A. No. Only a request for a credit report through our [289] bank.

Q. Well, from your own bank, with credit report? A. Yes.

Q. And they had no dealings with them whatsoever at all?

A. Not that I remember of, no.

Q. After the funds were received by the Bank of America, Eighth and Vermont Street—or, did

you have any knowledge of how those funds were to come in to the Bank of America, Eighth and Vermont Street? A. No, sir.

Q. Then, after, as you testified here, the Bank of America received the funds from the Cleveland Lumber and Door Company, did you receive any communication?

A. There was a communication advising that some funds had been received for these cars, in our name, and asking for a release. In fact, I think there was a request for a blanket release, and I replied to that in the wire which has already been put into evidence, that the funds would be released, less a certain figure.

Q. In other words, you had no control over those funds, you were not entitled to those funds excepting your commissions?

A. That is right.

Q. Now, you stated that on or about December 11th you [290] heard from Mr. McGuire of the Cleveland Lumber and Door Company, saying that the lumber was wet. A. Yes.

Q. Now, referring to this copy of this letter—I don't know whether it is in evidence—of December 11, 1947, did you then have any conversation with Mr. Bandy and Mr. Matjasic?

A. I called them immediately I got the call from Mr. McGuire and telling them that there was an error in specification, that the cars had been ordered "Airdry" and the consignee had said they apparently were not dry as requested, and that I

brought it to their attention immediately for disposition and/or adjustment, which we of course held Pioneer responsible for.

Q. Well, let me read the letter. We have it here. Oh, yes. Wait a minute. That was a telephone conversation? A. That is right.

Q. And then you confirmed it with that, a letter, the same thing? A. Yes.

Q. And addressed to the Pioneer Lumber Company? A. Yes.

Q. And that is the letter? I mean this is a copy of the letter?

A. That is a copy of the letter. [291]

Mr. Scholz: Then, I offer this in evidence as Defendants' exhibit next in order.

Mr. Johnston: May I see it? Has that been put in? I am going to object to that as not binding upon the plaintiff in this action. It is a matter between Pioneer and Allied.

Mr. Scholz: We don't quite think so. We think it is a matter between all three of them. Of course, your Honor has not read the letter. Would your Honor wish to see the letter?

The Court: You can state the contents of it.

Mr. Scholz: The contents are simply this: This is a letter to Pioneer Lumber Company:

"We refer to our conversation of today with Mr. Bandy and Mr. Matjasic relative to the following cars of bevel siding shipped to Cleveland Lumber and Door Company.

"I C 37703 shipped November 29, 1947

"S. L. and S. F. 149239 shipped December 1, 1947.

"We were advised by telephone today by the consignee that these cars apparently are not Air Dry as requested. We have been asked to bring this to your attention immediately for disposition and/or adjustment for which we, of course, shall hold you responsible. After talking to you we have asked by wire that the waybills and requested adjustment be forwarded directly to you.

"We trust that this will be handled promptly and satisfactorily. [292] We are indeed sorry that such a contention has arisen as we value highly the business and goodwill of this customer, as well as desiring all our transactions with them and you to be on a smooth plane.

"Will you please keep us advised on this matter."

The Court: How is that connected with the plaintiff?

Mr. Scholz: The connection with the plaintiff is in this way: We were advised, in other words Cleveland Lumber and Door Company advised Allied that apparently the cars were not air dried.

The Court: Well, it may be received. Objection overruled.

The Clerk: Defendant Allied's Exhibit V in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit V.)

Q. (By Mr. Scholz): Now, you note in this

letter which you wrote, Mr. Estcourt—you wrote that letter yourself, did you not——

A. Yes, I did.

Q. ——it refers to "After talking to you" (This is Pioneer) "we have asked by wire that the waybills and requested adjustments be forwared directly to you." What did that have reference to, that conversation that day?

A. When I talked to Mr. Matjasic at that time, he said that he couldn't understand why the cars were not up to specification, [293] he didn't have the waybills or bills of lading or anything in front of him and he would have to check into it, but he assumed that they had been sent already to Cleveland, so I said I would get hold of Cleveland and ask them to send either the waybills or copies, so that we could have some definite weight information as to what was in those cars and either prove Cleveland's contention that it was wrong or Pioneer's contention that it was right. The reply to that wire brought forth a moisture test, too, which I transmitted to Pioneer.

Q. And at the same time you sent this letter, you sent a wire to McGuire, Cleveland Lumber and Door Company, did you not?

A. Yes, I believe I did. I think it is there.

Q. And I hand you herewith what purports to be a copy of a wire addressed to Mr. F. T. McGuire, Cleveland Lumber and Door Co., reading as follows:

"Refer conversation siding sincerely regret ma-

terial apparently not as represented to us. Just contacted Pioneer Lumber 862 South Catalina Los Angeles. They cannot explain but request you forward immediately waybill test results and your desires for adjustment which they will conclude directly with you. Appreciate your keeping us advised we will cooperate all possible agreeable just conclusion."

You sent that wire? [294]

A. I sent that wire.

Mr. Scholz: I offer that in evidence, then, as defendant's exhibit next in order.

The Court: Admitted.

The Clerk: Defendant Allied's Exhibit W in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit W.)

Q. (By Mr. Scholz): Now, in response to that wire (Mr. Scholz shows document to Mr. Johnston), you received the wire from Cleveland Lumber and Door Company, McGuire, dated December 13th, is that correct? A. Yes.

Q. Now, this wire of December 13th states as follows:

"Re Wire Redwood Siding Inspection First Car Indicates Stock Dead Green We Cannot Use Under Any Circumstances Must Therefore Insist That Other Disposition Be Made Both Cars We Are Drawing Sightdraft on Pioneer Lumber Co for Entire Amount Paid in Advance by Ourselves

Kindly Urge Them to Honor Our Bank Very Much Disturbed and Contacting Their Bank This Morning."

Q. That is the wire you received?

A. That is right.

Mr. Scholz: I offer that in evidence as Allied's Exhibit next in order.

Mr. Johnston: Let me see that. [295]

Mr. Cashin: That is Plaintiff's Exhibit 13.

The Court: Admitted.

The Clerk: This is defendant Allied's Exhibit X in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit X.)

Q. (By Mr. Scholz): Now, you sent copies of those wires to Pioneer Lumber Company, is that correct? A. Yes, I did.

Q. And you sent a letter of transmittal dated on December 15th? A. Yes.

Q. And the letter of December 15, 1947, which you sent, states as follows:

"We enclose herewith copies of wires just received from Cleveland Lumber and Door Company. These are for your information and we ask that you make disposition as requested."

Is that correct? A. That is correct.

Mr. Scholz: I offer that in evidence as defendant's exhibit next in order.

The Court: Admitted.

The Clerk: Your Honor, that has already been admitted as Exhibit G. [296]

The Court: If it is in evidence, there is no need of admitting it again.

Mr. Scholz: Well, all right, then.

Q. Now, did you ever hear anything from Cleveland after you sent that wire or a copy of those wires, until 12-16, 1947?

The Witness: I am sorry, I did not quite get the question.

Q. (By Mr. Scholz): Did you hear anything from Cleveland—I mean did you hear anything from Pioneer in response to the communications you sent to them?

A. I don't believe there was any response other than the telephone conversation there between myself and Matjasic, or myself and Bandy, offering $5.00 a thousand adjustment.

Q. Mr. Bandy has testified you had a conversation on the 12th or 13th and then he refreshed his memory and he said the 10th or 11th. Did you have any conversation with Bandy between the 10th and 13th of December, outside of the one you have mentioned here?

A. The only one I mentioned there was the one in which we passed on Cleveland's complaint originally that the thing had not been received promptly. There was one later conversation, I believe it was about the 17th.

Mr. Scholz: May I interrupt you.

Q. Now, I want to ask you this question, now: I show [297] you a copy of telegram that went to Pioneer Lumber Company. Did you send the orig-

inal of this telegram, dated 12-17, 1947, to the Pioneer Lumber Company?

A. Yes. The copy is in my handwriting.

Mr. Scholz: I think that is Plaintiff's Exhibit 29 in evidence. This telegram reads as follows:

"Pioneer Lumber Company"——

The Clerk: Here.

Mr. Scholz: That is it.

"Refer Matter Cleveland Cars. They Advise Moisture Content 55% Lumber Not as Specified by You. Consignee Cannot Use. Please Advise Immediately Disposition You Want Made."

You sent that?

A. Yes.

Q. Now, you hadn't received any communications from Pioneer, from the time you sent the copies of the wires, except that telephone conversation, up to the time you sent this telegram?

A. Not that I remember, no.

Q. And then, on December 17th, you stated you had a telephone conversation with either Mr. Bandy or Mr. Matjasic, is that right? A. Yes.

Q. Do you recall which one it was?

A. No. I am sorry, I don't. It was probably Matjasic. [298]

Q. And what was the sum and substance of that conversation?

A. I called, in an effort to find out what was being done with regard to concluding this matter, and the quick summarization of it was that they were willing to offer a settlement of $5.00 a thou-

sand to adjust the difference in freight because of the added weight in the car, which I said was not at all acceptable in my mind because it wasn't a question of adjusting freight charges to anyone, it was a question of not shipping what had been asked for, but that I would transmit such information to Cleveland and let them decide what they wanted to do, at the same time recommending that they not accept it.

Q. And then, did you send this wire to McGuire, Cleveland Lumber and Door Company, dated 12-17, 1947?

A. Yes. It is a carbon, in my handwriting.

Mr. Scholz: I offer that in evidence. It is already in?

Mr. Johnston: That is in evidence, I think.

The Court: Admitted.

The Clerk: Defendant Allied's Exhibit Y in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit Y.)

Q. (By Mr. Scholz): Which telegram states:

"Retels Sorry unable phone yesterday. Assure you doing [299] everything reach satisfactory disposition. Will advise promptly. Pioneer offers five dollar thousand adjustment. Will reject unless you advise contrary. Is there any basis you can accept cars? Appreciate air mail letter giving full explanation conditions. Bank apparently refused your draft because we agents. Working on this."

You sent that telegram?

A. Yes.

Q. And in response to that you received this letter dated December 18, 1947?

A. That is right.

Q. And in which they stated, briefly, that the $5.00 was not acceptable and that they thought that you, along with them, had been victims of circumstances? A. That is right.

Mr. Scholz: I think that is in evidence already, isn't it?

Mr. Johnston: Yes.

Mr. Scholz: What is that exhibit number?

Mr. Johnston: Plaintiff's Exhibit 18.

The Court: We will recess for 10 minutes.

(Whereupon a short recess was taken.)

The Court: You may proceed.

Q. (By Mr. Scholz): I hand you herewith a copy of a telegram to Pioneer Lumber Company, dated 12-24, 1947. It [300] states:

"Refer Correspondence 2 Cleveland Cars. Have Cars Been Moved and Refund Made to Cleveland Lumber and Door? Appreciate Your Advising Status Immediately."

Did you send that wire?

A. I sent that wire. That is my handwriting.

Q. Did you receive any response to that?

A. There was a response at the end of the month, I believe there was a letter, to the effect that they would make no adjustment on it.

Q. That is the response, the letter dated December 30th?

A. I think that is the date, my remembrance of the evidence earlier.

Q. And that reference to Gaynor in that letter was with reference to another suit?

A. Another suit.

Q. And that referred to air dried or kiln dried lumber? A. Kiln dried.

Mr. Scholz: Now, I offer this in evidence as defendant's exhibit next in order.

The Court: Admitted.

The Clerk: Defendant Allied's Exhibit Z. [301]

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit Z.)

Q. (By Mr. Scholz): And then I show you herewith a letter from the Allied Lumber Company to Pioneer Lumber Company dated January 20, 1948, which has been marked Defendant Allied's Exhibit E for identification, and ask you if you sent that letter? A. I did.

Q. And that letter states, in brief, just part of it—I don't want to read the whole thing:

"Has the lumber shipped been returned to you or is it under your control?

"Is the statement of Cleveland Lumber and Door Company as to the lumber not being according to specification of the contract true or not?"

Did you receive any reply to that letter?

A. No.

Mr. Scholz: I offer this in evidence as Defendant's Exhibit E.

The Court: Admitted.

The Clerk: Defendant Allied's Exhibit E for identification, marked Exhibit E in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit E.)

Mr. Scholz: Now, there is a letter here from Mr. Johnston to the Pioneer Lumber Company, dated February 19, 1948, [302] for purposes of identification. Have you got that?

The Clerk: What number?

Mr. Scholz: Do you recall that?

The Clerk: Plaintiff's exhibit? What was the date?

Mr. Scholz: February 19, 1948.

Will you stipulate that that go in evidence?

Mr. Johnston: Yes, certainly.

Mr. Scholz: If your Honor please, then I offer in evidence a letter from Mr. Johnston, attorney for the Cleveland Lumber and Door Company, to Pioneer Lumber Company, dated February 19, 1948, which in part states—I better read the whole letter:

"Pioneer Lumber Company
"862 South Catalina Street
"Los Angeles 5, Calif.

"Re: Cleveland Lumber and Door Co.

"Gentlemen:
"As you know, we represent Cleveland Lumber

and Door Company. We are, by this letter, reciting certain facts which we have previously made known to you.

"On or about Oct. 3, 1947, you furnished Cleveland Lumber and Door Co. two carloads of redwood bevel siding. This siding was to be supplied in accordance with certain specifications. Before delivery you drew upon, and were paid by, Cleveland Lumber and Door Company in the sum of approximately $17,000. On inspection the lumber was found [303] to be not in conformity with specifications and useless.

"We have heretofore made demand upon you for return of the purchase price and have requested your instructions as to disposition of the siding. The total amount of The Cleveland Lumber and Door Company's claim is as follows:" and then naming certain figures, and then the last, concluding paragraph:

"We have no alternative other than that of bringing suit against you for the amount of Cleveland Lumber and Door Company's claim."

This is a letter addressed to Pioneer Lumber Company, dated February 19, 1948, and I offer that.

The Clerk: Are you offering this as an exhibit?

Mr. Scholz: Yes.

The Court: What is the number of that exhibit?

Mr. Scholz: It is Defendant Pioneer's Exhibit A for identification, and I am offering my copy as Allied's Exhibit AA.

The Clerk: The next number, your Honor, is AA.

The Court: What?

Mr. Scholz: AA, I think, your Honor.

The Court: It may be received.

The Clerk: Defendant Allied's Exhibit AA in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit AA.) [304]

Q. (By Mr. Scholz): Mr. Estcourt, did the Pioneer Lumber Company ever tell you, either before they shipped the lumber or after they shipped the lumber, or ever state to you in any way, that the lumber they shipped to Cleveland was green?

A. No.

Q. You are positive of that?

A. Absolutely.

Q. Did they ever state to you, either before or after, or at any time other than in this court, which was not to you, but other than in this court, that there was an error made on the invoices?

A. No.

Q. I believe you stated that you—and I rather rudely interrupted you—that you did state that you had a conversation with either Mr. Bandy or Mr. Matjasic on December 17th? A. Yes.

Q. I think Mr. Bandy stated he had a conversation with you on the 12th or 13th and then he changed it to the 12th or 11th, in which he stated you were mad, was that correct?

A. I think——

Q. I presume by "mad"—we will use the colloquilism meaning that you were angry?

A. That is right.

Q. Were you angry at that time? [305]

A. Evidently I was.

Q. And did he at that time state to you that the lumber was green? A. No.

Q. He did state, at that time, he offered to make an adjustment to Cleveland at $5.00 per thousand?

A. At that time, you mean the 11th or the 17th?

Q. No. I am talking about December 17th.

A. At that time, at the December 17th, it is my recollection that it was in that conversation that he offered to make the $5.00 adjustment to Cleveland.

Q. And why were you angry at that time?

A. For two reasons; one, that there had been such a gross departure from the specifications as given originally and as confirmed and promised by them, and secondly, that after making such a gross departure they would have the effrontery to offer a $5.00 adjustment on the freight in the hope that somebody would take it.

Q. By that gross departure you mean referring to what?

A. By shipping green instead of air dried.

Q. Did Pioneer tell you that that was green up to that time?

A. No. I assumed that it was green from the report that we had from Cleveland.

Mr. Scholz: That is all. [306]

Cross-Examination

By Mr. Seay:

Q. Now, Mr. Estcourt, in the conversation that you had with Mr. Matjasic prior to the time the order was filled, did he inform you that he had a shipment of two cars going to the Elliott Lumber Company in Illinois? A. No, he did not.

Q. And when was the first time you heard about these two cars going to Elliott Lumber Company?

A. The first time I heard that these particular cars were originally destined to Elliott Lumber Company, you mean?

Q. Yes.

A. It was when I saw the copies of the bills of lading or invoices from Hammond in my counsel's office.

Mr. Scholz: When was that?

The Witness: Oh, it must have been in the middle of this year, July, 1948.

Q. (By Mr. Seay): And Mr. Matjasic never at any time told you that he could divert orders from Elliott Lumber Company to Cleveland?

A. No. The question of diversion never entered into our conversation. The original understanding I had was that the cars were being loaded for them, that is, Pioneer, and that as they were loaded, they designated the consignee or [307] the destination point, and we were waiting continually for cars to fill the orders which we had placed with them. There were a number of car numbers given which were retracted later, but I knew nothing of the

fact that they were being loaded for other people and then diverted.

Q. Did you ever receive the car numbers on these specific shipments?

A. I received these two car numbers which have been entered in evidence, yes, by phone.

Q. And you transmitted those numbers to Cleveland?

A. I said those numbers were on their way, yes.

Q. Are you saying at this time, now, that Matjasic did not tell you, prior to the shipment of this order, that they did not have any dry material?

A. No. He never has stated that they did not have any dry material, to me.

Q. And in this letter that he read to you a few minutes ago, you received that letter, in which he stated that the conditions were such that they couldn't meet specifications of the Redwood Association? A. It is which letter?

Mr. Scholz: I suggest that you show the letter to the witness so that he may know which letter you are talking about.

Mr. Seay: I am sure he knows the letter. [308]

The Witness: I am sorry. I don't. I would like to see the letter.

The Court: Show him the letter.

Mr. Seay: I will strike that question, then, your Honor. It is taking up too much time as it is.

Q. Now, you made a remark at the opening part of your testimony, when you were called back, that

Mr. Bandy and Mr. Matjasic came to you seeking raw lumber or raw redwood to use in filling their orders? A. That is right.

Q. And, as a matter of fact, you at that same time or subsequent to that agreed to furnish them raw lumber to fill their orders with, is that right?

A. We would agree to furnish them when we received specific orders from them for certain materials, which we never received.

Q. And you never furnished them with any orders? A. No. We did not.

Q. And they told you at that time that they were having difficulty in obtaining raw material to fill the orders with?

A. They said at the time they first came to me they were having difficulty in obtaining redwood to fill their orders.

Mr. Seay: I believe that is all. [309]

Cross-Examination

By Mr. Johnston:

Q. Mr. Estcourt, is the Allied Lumber Company a corporation incorporated under the laws of the State of California? A. Yes, it is.

Mr. Johnston: May I have Plaintiff's Exhibits 1, 2, 3 and 26, please, and 25?

Q. Now, Mr. Estcourt, I show you Plaintiff's Exhibits 1 and 2, which I understand to be the orders that your company received from the Cleveland Lumber and Door Company, reading in part as follows:

"Carload 5/8 x 8 A and Better Thoroughly Air Dried——" A. That is right.

Q. And may I call your attention also to Plaintiff's Exhibit 3, which is a letter dated October 14, 1947, appearing over your signature. I take it that is your signature. A. That is my signature.

Q. (Continuing): "We acknowledge receipt of your orders numbers 1249 and 1250 for which we thank you. All conditions as outlined will be complied with."

Now, pursuant to the receipt of that and after the receipt of that, you forwarded to Pioneer your Order No. 10359 which has been introduced into evidence as Plaintiff's Exhibit No. 25? Will you examine that and see if that is the—— [310]

Mr. Scholz: May I suggest this, that he take the original order? I think that the original order is different.

Mr. Johnston: If you will find it for me.

Mr. Scholz: Yes. It is different than the copy. I think some part has been left out of the copy. Anyway, I want him to use the original. I think that part of this was left out.

Mr. Johnston: I am interested in your order No. 10359.

Q. (Continuing): Now, calling your attention to Defendant Allied's Exhibit O, which appears to be identical insofar as I can determine with Plaintiff's Exhibit No. 25, calling your attention to De-

fendant Allied's Exhibit O, I will read you a part of that order:

"2 Carloads 5/8" x 8" 'A' and better grade, air dry bevel siding;" that was an order you placed with Pioneer, wasn't it? A. That is right.

Q. And in that order to Pioneer, you omitted therefrom the word "thoroughly" as appears in the order to you people from Cleveland, is that correct?

A. I think I can—that is correct, but I would like to explain why that was omitted and how. You will note that this order No. 10359, Allied's, is dated October 2nd, which was written as a result of the conversation with Mr. McGuire ordering these two cars, to me by phone, and giving me these [311] two order numbers 1249 and 1250, which was dated October 3rd, which was subsequent to our order, which was by a phone conversation. These were not in our hands in the ordinary course of mail until about October 5th or 6th. The first one, this one had been written prior to that as a result of the phone conversation.

Q. I see. And did you then intend to correct your order No. 10359 to conform to Cleveland's order No. 1250?

A. No, because I didn't consider it was necessary to change it because this stated air dry and the pattern and the amount and that the Redwood Association's specifications should apply.

Q. But you made no demand upon or gave no

instructions to Pioneer to furnish thoroughly air dried?

A. No, because I felt that the word "thoroughly" was redundant.

Mr. Johnston: I move to strike "I felt that the word 'thoroughly' was redundant" from the witness' answer.

The Court: It may be stricken.

Q. (By Mr. Johnston): Do you remember what time of the day it was that you had the telephone conversation with Mr. McGuire on November 19th, that you testified to on direct examination?

A. I did not testify to November 19th. It was approximately that time and I feel that the time was some time between [312] 11:00 and 2:00, because that was when the calls usually came through due to the difference in time of day.

Q. That is 11:00 a.m. to 2:00 p.m.?

A. Two here, yes.

Q. Are you able to fix the date of that, now?

A. No, I am not able to fix the date of that now.

Q. I show you this—I think I have overlooked one piece of correspondence between Allied and Cleveland. This appears to be a telegram dated December 12th addressed to McGuire, Cleveland Lumber and Door Co., Estcourt, Allied Lumber Company, appearing to be the sender, and ask you if that telegram was sent by you?

A. Whether this is a true copy or not, I don't know, but I believe my counsel already introduced the copy which I sent of this wire, Mr. Johnston.

Mr. Johnston: I would like to offer this in evi-

dence, your Honor, as Plaintiff's Exhibit next in order. I don't believe it has gone into evidence. If it has, I withdraw my offer.

The Witness: I believe there was one in my handwriting, a carbon copy of that.

Q. (By Mr. Johnston): Now, Mr. Estcourt, in regard to this telephone conversation, you place it, I take it, on or about November 19th?

A. About mid-November, yes. [313]

Q. Did Mr. McGuire call you?

A. I do not remember whether it was a call from him to me or from me to him. There were a number of calls involved in this thing.

* * *

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acing official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 6th day of April, A.D., 1949.

/s/ THOMAS B. GOODWILL,
Official Reporter.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 47, inclusive, contain the original Amended Complaint for Rescission and for Money Had and Received; Answer of Cecil L. Bandy, etc., to Amended Complaint; Answer of Allied Lumber Company to Amended Complaint; Motion to Consolidate; Order Denying Motion to Consolidate; Opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Statement of Points to be Relied Upon on Appeal and Praecipe for Preparation of Record on Appeal which constitute the record on appeal to the United States Court of Appeals.

I further certify that my fees for preparing and certifying the foregoing record amount to $1.60 which which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 31st day of January, A.D., 1949.

EDMUND L. SMITH,
Clerk,

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12172. United States Court of Appeals for the Ninth Circuit. Allied Lumber

Company, Appellant, vs. The Cleveland Lumber and Door Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 1, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 121 72

THE CLEVELAND LUMBER AND DOOR COMPANY,

Appellee,

vs.

ALLIED LUMBER COMPANY,

Appellant.

STATEMENT OF POINTS TO BE RELIED UPON UPON APPEAL

The appellant, Allied Lumber Company, a corporation, desires and adopts as its points on appeal the statement of points appearing in the transcript of the record, to wit, the statement of points to be relied upon upon appeal which were filed in the

District Court of the United States for the Southern District of California, Central Division.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Appellant.

A copy of the foregoing motion was mailed by registered mail on February 24, 1949, to Newlin, Holley, Sandmeyer and Tackabury, 1020 Edison Building, Los Angeles, California, Counsel for the Appellee.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Appellant.

[Endorsed]: Filed Feb. 24, 1949.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED UNDER THE SUPERVISION OF THE CLERK OF THE NINTH CIRCUIT COURT OF APPEALS

Comes now Allied Lumber Company, a corporation, appellant in the above cause, and designates to be printed, pursuant to Rule 19 (6) of the rules of this court, the following parts of the record necessary for the consideration of Appellant's appeal from the judgment of the District Court, to wit:

1. Plaintiff's Complaint.
2. Defendant's Answer.

3. The transcript of the proceeds in the District Court, except that part thereof hereafter designated to be omitted, to wit:

(a) All of the reporter's transcript from beginning to Page 34, line 21.

(b) From Page 35, line 21, to Page 48, line 20.

(c) From Page 50, line 2, to age 64, line 21.

(d) From Page 67, line 8, to Page 70, line 2.

(e) From page 76, line 16, to Page 80, line 20.

(f) From Page 81, line 11, to Page 86, line 25.

(g) From Page 95, line 22, to Page 107, line 7.

(h) From Page 109, line 15, to Page 110, line 3.

(i) From Page 112, line 20, to Page 160, line 19.

(j) From Page 161, line 21, to Page 194, line 12.

(k) From Page 198, line 9, to Page 230, line 23.

(l) From Page 231, line 6, to Page 239, line 14.

(m) From Page 240, line 6, to Page 241, line 12.

(n) From Page 254, line 5, to age 254, line 25.

(o) From Page 257, line 11, to Page 272, line 25.

(p) From Page 314, line 5, to Page 325, line 6 (the end of transcript).

The printing of all original exhibits provided the Court approves the same.

Respectfully submitted,

/s/ RUDOLPH J. SCHOLZ,
Attorney for Appellant.

A copy of the foregoing designation was mailed by registered mail on April 18, 1949, to Newlin, Holley, Sandmeyer & Tackabury, 1020 Edison

Building, Los Angeles, California, Attorneys for Appellee.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Appellant.

Docketed.

[Endorsed]: Filed April 18, 1949.

[Title of Court of Appeals and Cause.]

APPLICATION FOR ORDER TO DISPENSE WITH PRINTING OF THE EXHIBITS

1. Appellant moves the court for an order to dispense with the printing of the exhibits in the printed record of this appellant, and to allow appellant and appellee to refer this court in the printed record, in the brief and in the oral arguments to the original exhibits, and as grounds therefor appellant states:

That the record prepared by the Clerk of the District Court and transmitted to this court as a record on appeal does or will contain all original exhibits for the inspection of this court.

There are approximately 49 original exhibits offered in this action. That as many of the exhibits were copied into the transcript by the reporter, and if any of them are not pertinent to the points on appeal, the printing of the original exhibits would result in duplication and unnecessary expense.

This application is made in the interest of economy.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Appellant.

A copy of the foregoing motion was mailed by registered mail of February 24th, 1949, to Newlin, Holley, Sandmeyer & Tackabury, 1020 Edison Building, Los Angeles, California, Counsel for the Appellee.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Appellant.

[Endorsed]: Filed April 29, 1949.

[Title of Court of Appeals and Cause.]

ORDER

Now on this date, the Court having read Appellant's application for an order to dispense with the printing of exhibits, and to permit appellant and appellee to refer this Court in the printed record, the Brief and the oral argument to the original exhibits, and for cause shown in said application;

It Is Ordered that the printing of all original exhibits be dispensed with in the printed record herein, and that appellant and appellee be allowed to refer this court in the printed record, the Brief, and in the oral argument to the original exhibits.

Dated April 26, 1949.

/s/ WILLIAM DENMAN,
Chief Judge, U. S. Court of Appeals for the Ninth Circuit.

/s/ CLIFTON MATTHEWS,
/s/ WILLIAM HEALY.

[Endorsed]: Filed April 29, 1949.

[Title of Court of Appeals and Cause.]

APPELLANT'S AMENDED DESIGNATION TRANSCRIPT TO BE PRINTED

Appellant, Allied Lumber Company, hereby amends and designates the following record to be printed on appeal in addition to the record heretofore set forth:

1. Findings of Fact and Conclusions of Law.
2. Judgment.
3. Opinion of Trial Court.
4. Notice of Appeal.
5. Statement of Points on Appeal.
6. Clerk's Certificate.

Dated May 25, 1949.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Appellant.

STIPULATION

It is hereby stipulated that the Appellant's Designation of Record to be Printed may be amended to include the above.

NEWLIN, HOLLEY, SANDMEYER & TACKABURY,
Attorneys for Appellee.

[Endorsed]: Filed June 1, 1949.

ALLIED LUMBER COMPANY,
Appellant,

vs.

THE CLEVELAND LUMBER AND DOOR COMPANY,
Appellee.